First Amendment Freedoms and the American Military

By

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The personal freedoms guaranteed by the First Amendment to the Constitution of the United States (the freedoms of speech, press, assembly, petition and religion) have always posed a special problem for the American military, in that their freedoms have had to have greater limitations placed on them than was the case in the civilian community. The interest in these greater limitations has been heightened by the United States' involvement in the Vietnam War.

This paper attempts to place the question of the limitations on the First Amendment freedoms in the interest of military discipline in perspective by looking at the history of the relationship between the two from 1775 to the present. The freedoms of speech and press are considered together as are the freedoms of petition and assembly. The freedom of religion is considered separately.

Based on the historical evidence, several conclusions are reached. In the interest of internal military discipline, as well as the pri-

macy of civilian control and the public's confidence in the military, substantially greater limits must be placed on the military's freedom of speech, press, petition and assembly than is the case in the civilian community. Thus, for example, persons in the armed forces are not permitted to express their grievances by organizing a protest demonstration. Such limitations are not needed in the area of religious freedom except in such cases as necessary medical treatment (even if in conflict with religious views) and the requirements of military courtesy. The principal problem is with the access of the serving personnel to chaplains, or other men of the cloth, in the interest of the free exercise of worship.

INTRODUCTION

This paper is concerned with those civil liberties comprehended by the First Amendment to the United States Constitution as they are enjoyed by those persons in military service. Of special interest is the period from the close of World War II to 1971. There are two reasons for this. In the first place, this is the era of the continuing confrontation between the Western world (especially the United States) and the Communist powers (or at least most of them). It is this confrontation, with its necessity of huge expenditures for defense and the constant pressure of the so-called wars of national liberation, that has placed such a great strain on the governmental institutions of the United States, including the military. That some of the strain has, perhaps, been contrived by those desirous of weakening the United States merely makes the understanding of military civil rights in this period all the more important.

The second reason is the rather unique fact that this same time period has also seen the great upsurge in interest in civil liberties in all quarters of the United States. Thus, for example, beginning with the Vinson Court and perhaps reaching its apogee in the Warren Court, the American judiciary has placed itself in the vanguard of this very valid concern for civil rights. The nexus of these two factors is the present concern over the civil liberties of servicemen.

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press;

> or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> The First Amendment to the Constitution of the United States of America

> Men accustomed to unbounded freedom and no control can not brook the restraint which is indispensably necessary to the good order and government of an army, without which licentiousness and every kind of disorder triumphantly reign.
>
> General George Washington to the President of the Continental Congress, 24 September, 1776.[1]

Thus is expressed the inevitable conflict between the highly cherished personal freedoms of Americans and the necessity for good order and discipline in the very military organization which is itself necessary to defend these prized freedoms. The debate concerning where one should stop and the other begin is today of greater public interest than at any time since at least the War Between the States and, perhaps, since the founding of the Republic.

Although certainly not as widely recognized in the military context, the dilemma of the inevitable choice between personal freedoms and necessary limitations on those freedoms is writ large in the growth of the law that presently finds its culmination in the two great legal systems that today comprise Anglo-American jurisprudence. As Roscoe Pound has described it,

> Throughout the course of the development which leads to the beginnings of the system of Anglo-American law or, as it is called, the common law, there is the problem of, on the one hand, effective ordering of conduct in a civilized society, and, on the other hand, such limitations of and checks upon those to whom that ordering is committed as to preserve due balance between the general society and the individual life.[2]

Seen in this light, the military problem of freedom versus discipline is but one aspect of the larger dilemma that confronts democratic

society. And, so in society as a whole, the solution to this problem within the military is not difficult to set down, as a legal theory. It has been stated any number of times in court cases where the conflict between individual rights and military discipline has been at issue. Illustrative is United States v. Miller[3] where Chief Judge Caleb M. Wright of the United States District Court, District of Delaware, said, "It has long been recognized that military personnel . . . surrender some of their individual rights so that military discipline and security may remain inviolate."[4] (Emphasis mine.)

That statement sets the parameters of this inquiry. It does so in three ways. First, the statement limits itself to military personnel. This inquiry will also be so limited. Our study will principally involve, in the words of Chief Justice Warren, the "vertical reach of the Bill of Rights within the military."[5] We cannot, however, be solely limited to this "vertical reach," because we will find that the jurisdiction of the military over military personnel has been increasingly questioned. Therefore, we must, to some degree, also consider what the Chief Justice has called the "horizontal reach of the Bill of Rights," that is, those situations that, "pose principally the question whether the complaining party [the party who seeks to escape military jurisdiction] is a proper subject of military authority."[6]

Secondly, Judge Wright speaks in terms of "individual rights." This inquiry will limit itself even farther than that. It will, exclusively, deal with those great rights found in the First Amendment to the United States Constitution. This is to say that by way of limitation, I am, for example, excluding all those rights or, if you will, protections, that are thrown around a person suspected, or accused, of crime. This is not

to say that somewhat the same conflict is not present when these latter rights come up against the necessity of the maintenance of discipline. The conflicts do arise; search and seizure comes to mind. They are important, but they are beyond the scope of this paper.

Third, there is mentioned, "surrender [of] some of their individual rights." To what extent are these rights to be surrendered, and under what circumstances? Obviously, there is here involved, to use the apt phrase of Justice Oliver Wendell Holmes, Jr., "picking out a line by successive decisions."[7] In this regard, we will be considering not only these decisions of courts within the military justice system, but regular federal courts as well.

One must, however, be very careful not to confine his thoughts strictly to the line of judicial decisions. Also to be included are laws passed by Congress and the policy of the military itself, to include the policy of its Commander-in-Chief, the President. Neither Congressional legislation nor military policy are necessarily related to the judicial decisions, although both, at times, have been. This whole process has, in turn, been affected by that great amorphous force, "the mood of the country." Sometimes the effect has been negative in the sense that this mood has been indifference, but the effect is always there, as it should be.

It should also be clearly noted that the body of law that is presently growing up around claims of conscientious objection by those already in military service is beyond the scope of this paper. It has long been the law that conscientious objection is not a right derived from the First Amendment, but is rather a privilege granted by statute.[8]

One further consideration needs to be stated. It is one of the

tragedies of the present generation of young Americans that many of them have failed to study history and among those who have studied it, many, if not most, have not comprehended its lessons. The reasons for this are not germaine to this paper, but they merit careful consideration by all of us who are concerned with a view toward correcting this unhappy state of affairs. The results of this loss of historical perspective are very much in evidence. Since it is impossible for many in this generation to place contemporary events in proper relation to the past, the events are instead set against varying idealistic utopian templates which never have existed and will not exist in the foreseeable future. This, as might be expected, produces great dissatisfaction because when compared with utopia, most contemporary events come in a very poor second. The American military has been the victim of a great deal of criticism based on these visions of utopia rather than on real appraisals in the light of historical perspective. Such a situation is particularly unfortunate because certain of the civil liberties of those in military service are curtailed by the very valid and necessary need for discipline, a need by and large, although not entirely, peculiar to the military. Yet, measured against an idealistic utopian model such curtailment is often seen as both evil and unnecessary or at times, only as evil, without even any consideration being given to its necessity. Therefore, this paper hopes to place this whole question in proper historical perspective.

CHAPTER I

THE EARLY YEARS

The American Revolution 1775 to 1783

It is generally accepted that the land forces of the United States came into being on June 14, 1775, when the Second Continental Congress voted to adopt the army of New England militia then besieging Boston and to raise ten companies of riflemen to be enlisted directly into Continental service.[1] The naval forces of the United States date officially from October 13, 1775, at which time the same Congress, by resolution, called for the fitting out of two vessels to be used to intercept sea traffic then supplying the British forces in the territory of the Colonies.[2] The military history of the thirteen Colonies goes, of course, back many decades from these two dates in 1775. However, for the purposes of this inquiry, it is generally sufficient to begin with them.

The first Articles of War for the governing of the land forces, the "Continental" Army, were adopted by the Second Continental Congress on June 30, 1775. They were described as "for the due regulation and well ordering" of "an armed force sufficient to defeat the hostile designs of the British government with reference to the rights of the colonies , and to preserve and defend the lives, liberties and immunities of the Colonists."[3] Although they nowhere so state, the Articles were apparently intended to govern the colonial militia in the service of the

Continental Congress as well as those troops enlisted directly into Continental service. At times the militia did not seem to agree.[4]

These first Articles appear to have been a mix between the then existing British code which governed the Ministerial troops in North America and the Massachusetts Articles of War, the latter having been adopted only on April 5, 1775.[5]

Certain of these Articles are illustrative of the clash between the conditions which were considered to be required for the maintenance of discipline and the freedoms of speech, religion, press, assembly and petition for a redress of grievances, later to be codified as fundamental law in the First Amendment. Whether these restrictions on personal freedom reflected much thought by the Congress, or were merely adopted because they were in use by the British and the Massachusetts colony, it is not possible to say, although the latter alternative seems the most likely. Whichever was the case, they clearly show the types of limitations then considered necessary, a number of which can be directly traced into the present-day Uniform Code of Military Justice.

The most stringent limitations were placed on freedom of speech and assembly.

> Article III.
> Whatsoever non-commissioned officer or soldier shall use any profane oath or execration, shall incur the penalties expressed in the second article [small fines and brief confinement] ; and if a commissioned officer be thus guilty of profane cursing or swearing, he shall forfeit and pay for each and every such offense, the sum of Four Shillings, lawful money.[6]

> Article IV.
> Any officer or soldier, who shall behave himself with contempt or disrespect towards the General or Generals, or Commanders in chief of the Continental Forces, or shall speak false words, tending to his or their hurt and dishonor, shall be punished according to the nature of his offense, by the judgment of a general court-martial.[7]

Article V.

Any officer or soldier who shall begin, excite, cause, or join in any mutiny or sedition, in the regiment, troop, or company to which he belongs, or in any other regiment, troop or company of the Continental Forces, either by land or sea, or in any party, post, detachment, or guard, on any pretence whatsoever, shall suffer such punishment, as by a general court-martial shall be ordered.[8]

Article IX.

Whatsoever officer, or soldier, shall be convicted of having advised or persuaded any other officer or soldier, to desert, shall suffer such punishment, as shall be ordered by the sentence of a general court-martial.[9]

Article XI.

No officer or soldier shall use any reproachful or provoking speeches or gestures to another....[10]

Article XXIV.

No officer or soldier shall...offer any insult, or abuse, to any person who shall bring provisions, or other necessaries, to the camp or quarters of the Continental army; any officer or soldier so offending, shall, upon complaint being made by the commanding officer, suffer such punishment as shall be ordered by a regimental court-martial.[11]

There was a strange quasi restriction to be found in these Articles.

Article II.

It is earnestly recommended to all officers and soldiers, diligently to attend Divine Service; and all officers and soldiers who shall behave indecently or irreverently at any place of Divine Worship, shall, if commissioned officers, be brought before a court-martial, there to be publicly and severely reprimanded by the President; if non-commissioned officers or soldiers, every person so offending, shall, for his first offense, forfeit One Sixth of a Dollar, to be deducted out of his next pay; for the second offense, he shall not only forfeit a like sum, but shall be confined for twenty-four hours, and for every like offense, shall suffer and pay in like manner; which money so forfeited, shall be applied to the use of the sick soldiers of the troop or company to which the offender belongs.[12]

Rather than being limited, the freedom to petition the Government (in this instance, the Army) for a redress of grievances was actually protected, albeit in a form somewhat shamanalized by the chain of command.

Article XIII.

If any officer should think himself to be wronged by his colonel or the commanding officer of the regiment, and shall, upon due application made to him, be refused to be redressed, he may complain to the General or Commander in chief of the Continental Forces, in order to obtain justice, who is hereby required to examine into said complaint, and see that justice be done.[13]

Article XIV.

If any inferior officer or soldier shall think himself wronged by his captain or other officer commanding the troop or company to which he belongs, he is to complain thereof to the commanding officer of the regiment, who is hereby required to summon a regimental court-martial, for the doing justice to the complainant; from which regimental court-martial, either party may, if he thinks himself still aggrieved, appeal to a general court-martial; but if, upon a second hearing, the appeal shall appear to be vexatious and groundless, the person so appealing shall be punished at the discretion of the general court-martial.[14]

There was nothing in these articles that specifically prohibited a petition for a redress of grievances being made outside military channels, e.g., direct to the Congress. As will be seen later, this method came to be frequently employed.

The punishments, for these offenses, virtually all within the discretion of the court-martial, do not appear to have been generally taken from the British articles and were very light in comparison therewith. The maximum penalty that could be awarded by a court-martial for any of the offenses mentioned above was 'degrading, cashiering, drumming out of the Army, whipping not to exceed thirty-nine lashes, fine not exceeding two month's pay of the offender, imprisonment not exceeding one month.'[15]

The Articles of War of 1775 were weak, especially in the matter of punishments, and they did not take long to prove their inadequacy, as General Richard Montgomery, among others, was soon to discover. The weakness became quite apparent when the going got rough, as it surely

did for the soldiers laying siege to Quebec in the Winter of 1775-76. In a letter to General Philip Schuyler, Montgomery voiced [illegible] complaints. "Upon considering the fatal consequences which might flow from a want of subordination and discipline should this ill humor continue, my unstable authority over troops of different colonies, the insufficiency of the military law, and my own powers to enforce it, weak as it is, I thought it expedient to call the field officers together."[16] General Montgomery did not single out any specific weakness in the Articles, but he surely must have had in mind the manner in which they dealt with speech and assembly, including, of course, the inadequate punishments provided for these offenses.

General Schuyler himself found much the same sort of thing among the New England troops. On October 31, 1775, he wrote that, "There is such an equality among them, that the officers have no authority, and there are very few among them in whose spirit I have confidence. The privates are all generals but not soldiers."[17]

Washington caused to be published a general order in August of 1776 in which he expressed himself on certain kinds of speech, "The General is sorry to be informed that the foolish and wicked practice of profane cursing and swearing . . . is growing into fashion."[18] Officers were encouraged to attempt to check the practice by example and influence.[19]

Later writers have agreed that the Continental troops were reluctant to accept curbs on their freedom, including to be sure, those of speech and assembly.

> A fiercely independent spirit among both officers and men, amounting almost to anarchy hindered all efforts to transform the mob into an army. Officers were compelled to indulge their troops to a dangerous degree lest re-enlistment be discouraged and the new year find the country without an army of any kind.[20]

When attempts were made to enforce these Articles limiting speech, the meager records available indicate not only that acquittals were frequent, but even a conviction might bring only a token or light punishment. In December, 1775, a captain named Wentworth Stewart was tried by general court-martial for being grossly abusive of a Lieutenant Colonel March. The court found Captain Stewart guilty of repeated abuse as charged and as the total punishment he was ordered to ask pardon of Colonel March in front of all the officers of the regiment and was to be severely reprimanded by a Colonel Putnam (presumably the regimental commander).[21]

October, 1775, saw the trial of Lieutenant Richard Woodward, who truly must have been a remarkable miscreant in an army that had its share of them. He was found guilty by a general court-martial of cowardice, mutiny and of making accusations of Captain Grimley which were not only malicious and vexatious but which were groundless as well. For all this, his sole punishment was to be cashiered from the service.[22]

At about the same time, Dr. Samuel Chiney, the regimental surgeon of the 34th Infantry, was tried by general court-martial for, "villifying the characters of Major Generals Lee and Putnam" and was found guilty of speaking words tending to the dishonor of the character of Putnam. He was sentenced to be cashiered.[23]

Today, for an officer, dismissal from the service is severe punishment, almost always accompanied by a prison sentence, and generally carrying the stigma of a dishonorable discharge. In 1775 it is far from likely that it amounted to much at all. America had not even begun the drift toward the type of records-conscious society that we live in today. A man had only to travel west or even to another Colony to begin a new life.

In May of 1776, an enlisted man named Joseph Child was found guilty by general court-martial of profane cursing and swearing and of speaking in contemptuous fashion of the American army. His only punishment was to be drummed out of the Army.[24]

In the latter part of 1775, there occurred a strange series of events that contained elements of speech, assembly and religion. In that these events were by him considered detrimental to discipline and the overall welfare of the American cause, General Washington took pains to see that they were discontinued. A general order dated November 5, 1775, described the situation.

> As the Commander in Chief has been apprised of a design formed for the observance of the ridiculous and childish custom of burning the Effigy of the Pope--He cannot help expressing his surprise that there should be officers and soldiers in this army so void of common sense, as not to see the impropriety of such a step at this juncture; at a time when we are soliciting, and have already obtained, the friendship and alliance of the people of Canada, whom we ought to consider as Brethren embarked in the same cause, the defence of the general liberty of America: at such a juncture, and in such circumstances, to be insulting to their Religion, is so wanton as not to be suffered or excused; indeed instead of offering the most remote insult, it is our duty to address public thanks to these our Brethren, as to them we are so much indebted for every happy success over the common Enemy in Canada.[25]

In addition to the rather vague reference to divine service in the Articles of War, there were infringements on the freedom of religion. In May of 1776, a general order was published making reference to the fact that the Congress had set aside May 17 as a day of, "fasting, humiliation and prayer, humbly to supplicate the mercy of Almighty God that it would please Him to pardon us from all our manifold sins and transgressions, and to prosper the Arms of the United Colonies and finally establish the peace and freedom of America upon a solid and lasting

foundation." The order required all officers and soldiers to strictly obey the views of the Congress and, "by their unfeigned and pious observance of their religious duties, imcline the Lord and Giver of Victory to prosper our arms." There is no record of how strictly this order was observed.[26]

The first Rules for the Regulation of the Navy were enacted by the Second Continental Congress on November 28, 1775.[27] In regard to the freedoms that are under consideration, these rules are quite similar to those for the land forces except in the matter of punishments which were considerably more stringent. Freedom of religion was much more seriously impaired than was the case under the 1775 Articles of War. The second paragraph of the Rules provided that commanders, "are to take care that divine service be performed twice a day on board, and a sermon preached on Sundays, unless bad weather or other extraordinary accidents prevent it."[28] There then followed a limitation on speech in the name of religion wherein those on board ship were forbidden to "swear, curse, or blaspheme the name of God" and those reckless enough to do so were required, "to wear a wooden collar, or some other shameful badge of distinction" for an appropriate length of time, or if an officer, to be fined.[29]

Freedom of petition for redress of grievances was protected by providing that any person who felt that he had just cause for complaint was to "quietly and decently" inform a ship's officer or the captain who was required to "take care that justice be done him."[30] The value of this protection is highly questionable in that many naval officers of the day would simply not support a sailor against another officer or petty officer.

There appear to have been no limits on the punishments that could be inflicted in the discretion of the court-martial, except that capital punishment was allowed only in those cases specifically mentioned and a vague reference to punishments being governed by the laws and customs of the sea.[31] However, ship's captains could inflict no punishment beyond twelve lashes with a cat of nine tails without a court-martial ordered by the Commander in Chief of the Navy.[32]

The Navy appears to have been better satisfied with its Rules than the Army with its Articles of War, because the Rules remained in force throughout the war and were used for a time by the Navy establishment under the Constitution.[33] Perhaps it was the greater severity of the permissible punishment that made naval personnel more willing to submit to curtailment of their personal freedom. No doubt, also, the rules were much easier to enforce aboard ship. There was no place to escape from the prospect of twelve lashes with a "cat" would be enough to discourage a man from too ardent a pursuit of his freedom of speech or assembly. In any event, as far as the records indicate, the Navy did not suffer the serious disciplinary problems that plagued the Army. Then, too, the Navy was always small in comparison to the Army.

In the Army, under its 1775 Articles, freedoms of speech and assembly flourished to the detriment of discipline. The weakness of the Articles was proving to be a monumental hindrance in a task that would have been difficult even with the most stringent articles of war; that of imposing adequate discipline with its corresponding curtailment of freedoms, especially speech and assembly, on the sometimes enthusiastic but always independent soldiers. George Washington, who was determined "to bring them under proper discipline and subordination," realized that

it, "requires time and is a work of great difficulty."[34] He consequently sought help from Congress in regard to the Articles and in this was rendered valuable assistance from William Tudor, the first Judge Advocate General of the Army.[35] As a direct result of these efforts, on June 14, 1776, Congress resolved that the so-called "Committee on Spies" revise the Articles.[36] It consisted of John Adams, Thomas Jefferson, John Rutledge and James Wilson.[37] The Committee then appointed Adams and Jefferson as a subcommittee to do the drafting of the revised Articles.

It is in Adams' description of their work that for the first time there is evidence of popular (or at least Congressional) pressure against abridgement of the personal freedoms of those persons in the armed forces. For this reason, Adams, who it seems did all the work, found the work of revision to be a "difficult and unpopular subject."[38] He admits telling Jefferson that, "whatever alteration we should report with the least energy in it, or the least tendency to a necessary discipline of the army, would be opposed with as much vehemence as if it were the most perfect."[39] This Congressional opposition is later described by Adams as being based on the "undigested notions of liberty prevalent among the majority of members most zealously attached to the public cause."[40]

It is at least questionable whether the opposition was as formidable as Adams made it out to be. In writing to his wife on October 11, 1776, shortly after the passage of the new Articles, Joseph Reed commented that, "Where the principles of democracy so universally prevail, where there is so great an equality and so thorough a leveling spirit predominates, either no discipline can be established, or he who attempts

it must become odious and detestable, a position which no one will choose."[41]

Inasmuch as he felt that any change that diminished the liberty of those in the military in the interest of the better discipline which Washington was seeking, would meet with as much opposition as a really tight set of articles of war, Adams resolved to make a complete revision and see what would happen. As he said, "something might perhaps be gained."[42] It is worth quoting, in some detail, Adams' thoughts as to where to look for a pattern to follow in the revision.

> There was extant one system of articles of war which had carried two empires to the head of mankind, the Roman and the British; for the British articles of war were only a literal translation of the Roman. It would be vain for us to seek in our own inventions, or the records of warlike nations, for a more complete system of military discipline. It was an observation founded in undoubted facts, that the prosperity of nations had been in proportion to the discipline of their forces by land and sea.[43]

Thus does Adams link the necessity of curbs on personal freedoms of those in the military with the security of the nation. That such has been the case since is hardly open to question.

Adams was therefore in favor of scrapping the 1775 Articles and reporting a complete revision consisting of the British Articles of War, in "totidem verbis."[44] Jefferson, whom Adams notes, "in those days never failed to agree with us in everything of a political nature" agreed and the British Articles were reported.[45] Adams further described the revised Articles as a "measure that I consistently urged on with all zeal and industry possible, convinced that nothing short of the Roman and British discipline could possibly save us."[46]

In the debate on the new Articles, Adams complained that Jefferson

never once opened his mouth in their defense and that all the work of overcoming the fierce opposition fell on him.[47] The Articles were, however, adopted. They appear in the Journal of the Second Continental Congress under date of September 20, 1776. It is, however, doubtful that they were an exact copy of the contemporary British Articles. Winthrop notes that they were, instead, merely an enlarged version of the 1775 Articles with modifications, but were at the same time a "complete recasting of the same" in the sense that they were arranged after the pattern of the British Articles.[48] These Articles of 1776 made only one significant change directly pertaining to the freedoms of speech, assembly etc. Article 1 of Section II forbids any officer or soldier to use, "traitorous or disrespectful words against the authority of the United States in Congress assembled, or the legislature of any of the United States in which he may be quartered."[49] Of greater significance is the change in permissible punishments for this type of offense. There was an increase in the number of lashes that might be awarded from thirty-nine to 100, and in the case of inciting mutiny, capital punishment was allowed, although it was not made mandatory.[50]

No time was lost in getting the new Articles into the field. On September 27, 1776, John Hancock, President of the Continental Congress wrote as follows to General Schuyler: "In order that these troops may be better disciplined, the Congress have abolished the systems of rules for the government of the army which they first instituted, and have adopted a new one, sundry copies of which I enclose you."[51]

The 1776 Articles were to continue in force with but minor changes, none of which need concern us, until 1806.[52] Although John Adams believed that, "they laid the foundation of a discipline which, in time, brought

our troops to a capacity of contending with British veterans and a rivalry with the best troops of France,"[53] no such remarkable change was apparent for quite some time. Great liberty of speech, assembly and religion continued to be enjoyed to the detriment of discipline in so far as at least the first two were concerned.

In fact, not until 1778, after Valley Forge was Washington's new drill master par excellence, Baron Friedrich Wilhelm von Steuben, able to improve the abilities of the troops to drill and maneuver, but even he could do little about the "prevailing insubordination."[54] In 1779, Steuben confided to Benjamin Franklin that, "We want above all, the true meaning of the words, liberty, independence, etc., that the child may not make use of them against his father, or the soldier against his officer."[55]

Insubordination continued to plague the Continental forces. On September 5, 1779, a Captain Ashmead was convicted of what amounted to "open defiance and opposition from an inferior to his superior officer upon a parade." The captain finally resigned from the Army in May, 1780, apparently unsentenced. Washington commented that this sort of exercise of free speech "must in every well regulated army be deemed a breach of order and discipline."[56]

The year 1779 also saw the officers of one of Washington's regiments enter into a combination to effect the relief of their grievances. These were the officers of the First Regiment of the New Jersey Brigade which at that time was under orders to engage in a campaign against the Indians. These officers exercised their freedom of speech, assembly and petition in order to obtain back pay from the legislature for themselves and the troops under their command. If the pay was not forthcoming within three days they threatened to "consider themselves out of the service." Through

the good offices of General Washington, the officers withdrew their demand and the legislature arranged payment without delay.[57]

On March 23, 1780, a Major Moore was convicted by court-martial of "speaking in a very dishonorable and disrespectful manner of Congress," in a conversation with another officer at West Point. He suffered only a reprimand.[58]

In August of the same year, the insubordination of the troops remained so bad the General Nathaniel Green complained to Washington that, "the impudence of the soldiers is intolerable."[59]

January, 1781, saw one of the most serious threats of the unchecked freedoms of speech, assembly and petition. This was the mutiny of the Pennsylvania Line. Refusing to heed their officers, a few of whom were killed or wounded in an attempt to check them, the troops, led by some of the sergeants, marched toward Philadelphia which was then the seat of the Continental Congress. It was their intention to seek redress for what were quite valid grievances: no wages, no issue of clothing and inadequate rations. The Congress, recognizing the justness of the soldier's complaints, took steps to settle them and what could have been a serious crisis was averted.[60]

In June of 1781, a second mutiny with the same general aims was carried out by the New Jersey Line. By this time, Washington had become determined to finally quell the insubordination and instructed General Robert Howe to take 500 troops and suppress the mutiny. This was done and two of the ringleaders were subsequently executed.[61]

By 1783, stern measures were being taken against speech and assembly that endangered discipline. In April of that year, a soldier named John Willar of the Pennsylvania line was convicted by general court-martial

of 'speaking disrespectfully of His Excellency Genl. Washington and Congress [and also] drinking a health to King George." He was sentenced to receive 100 lashes and to be drummed out of the service with a halter around his neck.[62]

It can be seen from the foregoing that only toward the close of the Revolutionary War was any serious attempt made in the Army to curtail the soldiers' speech and assembly. Clearly, Congress was reluctant to see the freedoms of the troops impaired. John Adams found such reluctance in Congress, and Washington hinted at the same thing in a letter to the President of the Congress on May 11, 1776. "I have endeavored and I flatter myself not ineffectually, [to support] the authority of the Congress and due subordination in the Army. I have found it of importance and expedient to yield many points, in fact, without seeming to have done it, and thus to avoid bringing on a too frequent discussion of matters which in a political point of view ought to be kept a little behind the curtain."[63] It is, however, also clear that the military leaders such as Washington, Green, Montgomery and Schuyler and such men in government as John Adams and Joseph Reed realized the close relationship between discipline and the curtailment of the soldiers' freedoms of speech, assembly and petition (when the latter partook of the nature of a mutinious assembly). Freedom of religion was probably not seriously impaired, although the troops were no doubt encouraged, with varying degrees of insistence, to participate in religious observances. Freedom of the press does not seem to have been an issue. Certainly there is no record of disgruntled Continental soldiers operating an underground newspaper.

In the Navy, on the other hand, the sailors' freedoms seem to have

been considerably more curtailed and discipline somewhat better than in the Army. Not only was the Navy much smaller, but it was also much less visible. Disciplinary rules limiting freedom of speech and assembly were also more easily enforced on shipboard. Attendance at Divine Service, an infringement of freedom of religion, was taken more seriously, at least in the Regulations. In actual practice, it probably varied greatly from vessel to vessel depending upon the inclinations of the commander.

In sum, it may be concluded that at the close of the Revolution the necessity for those persons in military service having more restricted freedoms, especially speech and assembly, had been generally recognized and the precedents laid for such curtailment in the future. However, the experience of the war had clearly indicated that the average American in service did not easily surrender these freedoms to any degree. In service, freedom of religion remained somewhat vague and does not appear to have been made an issue. Freedom to petition within military channels for redress of grievances had been protected and other types of petition were not prohibited unless they took on the character of a mutinous assembly.

From Revolution to Civil War 1783-1861

This was a period during which the United States maintained very small standing regular land and sea forces. In the two principal wars of this period, 1812-1815 with Great Britain and 1845-1848 with Mexico, the land forces were expanded by calling militia into Federal service and enlisting volunteers directly into Federal service. These war periods provide an interesting contrast in these personal freedoms of speech and

assembly, especially speech, of those in military service when compared with the regular army during the intervals between the wars. The Navy, which did not experience this great influx of nonregulars, and for other reasons which will become apparent, did not witness the upsurge in these personal freedoms.

In 1783, soon after the Revolutionary War was officially closed by the Treaty of Paris, the Continental Congress elected to place the land defenses of the nation chiefly in the hands of the militia of the several states. Soon thereafter, the Regular Army was reduced to a single infantry regiment and one battalion of artillery; a grand total of 600 officers and men.[64] The Navy was for a time in even worse straits.

Very little is known about the discipline of the tiny Regular Army which existed up to the War of 1812. However, several factors allow us to infer that the lessons of the Revolutionary War were not lost on those in command, and that, consequently, those freedoms that came to be guaranteed by the First Amendment to the Constitution (which was ratified in 1791), especially speech and assembly, were strictly curtailed by careful enforcement of those appropriate provisions of the Articles of War of 1776 as amended in 1786, revised in 1806 and again amended in 1812. The amendments of 1786 were procedural and made no changes of importance to the subject of this paper.[65] The revision of 1806 did accomplish several changes that are worthy of mention although they did not greatly alter the then existing restrictions on First Amendment freedoms.

First, the prohibitions against certain types of speech directed to superiors were altered (reflecting the governmental structure under the Constitution) to include the President and Vice President, Congress, and the governor and legislature of any state in which the soldier might be

quartered.[66] The maximum punishment where the death penalty was not awarded was reduced to fifty lashes.[67] Lastly, the prohibition against insulting those bringing provisions to the army was dropped,[68] although it could now be brought under Article 99, the general article. The general article becomes important later on. It forbids such things as disorders which are to the prejudice of good order and discipline. The importance of such a prohibition in the area of speech, press, assembly and petition should be self-evident.

In 1812, the Articles of 1806 were amended to abolish the punishment of flogging.[69] This, of course, left the court-martial free to imprison, fine or give a punitive discharge or dismissal to those who violated the military restrictions on First Amendment freedoms.

As a result of two defeats by Indians in 1790 and 1791, the Congress authorized an expanded regular Army, to be known as the Legion of the United States. It was to be comprised of all three combat arms and to total something over 5000 men, all Regulars. President Washington appointed General Anthony Wayne to command it.

As far back as December 15, 1776, in a letter written from Ticonderoga, Wayne had expressed himself on the subject of discipline and its relationship to the individual freedom of the soldier. "In regard to discipline, we understood by this only to put a necessary constraint on the principle of freedom to prevent it growing into licentiousness which it unavoidably would if not curbed in an army--here I must once more call in the aid of Marshal Saxe--he says--and he says well--'that it is a false notion, that subordination, and a passive Obedience to Superiors, is any Debasement of a man's Courage--so far from it, that it is a general remark that those Armies that have been subject to the severest Discipline have

always performed the Greatest things."[70] It was in this spirit that Wayne set out to impart discipline to his new Regulars of the Legion; to "put a necessary constraint on the principle of freedom." It was these regulars who finally defeated the Indians at the Battle of Fallen Timbers on August 20, 1794.

Another glimpse of the constraints put on personal freedom of expression is provided by a petition communicated to the U.S. House of Representatives in January, 1805, by a number of citizens of Tennessee, chief among whom was Andrew Jackson. The petition protested the treatment and court-martial conviction of a Colonel Butler of the Regular Army because he had refused an order to cut his hair.[71] This incident does not, of course, directly involve speech but it is close enough to give a feeling of the type of restraints that existed in the Regular Army at this time. An inference about Army curtailment of personal freedoms may also be drawn from events that took place in the Navy since both services were, during this period, small and professional.

On April 23, 1800, the Congress promulgated new Articles for the Government of the Navy, but the changes therein were mostly minor in relationship to those freedoms protected by the First Amendment. The sailors' religious freedom was further infringed upon in that commanders of naval vessels were, in addition to being required to hold worship services twice a day with a sermon on Sunday (except when prevented from doing so by extraordinary circumstances) were now required to see that all of the ship's company, except those who could not be spared from duty, attended these services.[72] In addition, a maximum penalty of 100 lashes was established in all except capital cases.[73] This was probably small comfort to those sentenced to the maximum. The new articles brought the

Navy pretty well into line with the Army with the exception of punishments and forced participation at religious services. And, as mentioned before, the strict observance of the attendance requirements at religious services probably varied from ship to ship. After all, "spare from duty" could be interpreted as desired. It will be recalled that the Army abolished flogging in 1812 while the Navy retained it for a number of years thereafter.

These Articles that limited the freedom of speech and petition were rigidly enforced if the following cases are any example. On board the frigate Congress on April 3, 1801, the following charges, among others, were preferred against Surgeon Samuel R. Marshall.

> 2nd. For having on the 19th January (1801) (then being at Sea) made use of expressions upon the Quarter deck of this Frigate; having a tendency to excite discontent, dissatisfaction, and Mutiny in the minds of the ship's Company.---which conduct is destructive of good order, and the Naval discipline.
>
> 3rd. For having on the 22nd day of January, 1801, premeditatedly offer'd me, as the Commander of the U.S. Frigate Congress, the most pointed insult, by officially dictating, and addressing to me, a letter, replete with menacing, insolent, and disrespectful language; which conduct is highly indecent, and improper, and tends to the entire subversion of discipline, subordinstion, and good order.---
>
> 4th. For having made use of language in the Ward room of the U. S. Frigate Congress, declaratory of your warm Approbation of the Mutinous, Murderous conduct of the Crew of His Britanic Majesty's Frigate Hermione.[74]--- which conduct is highly injurious, and tends not only to the entire destruction of all order, and discipline; but also renders insecure the lives of officers, serving on board Ships of War.[75]

The records indicate that Marshall was acquitted and he was allowed to remain in the service.[76]

The year 1801 was a bad one for naval surgeons. On April 11, 1801,

Charles Webb, surgeon of the U. S. Brig of War Eagle was tried by court-martial aboard the U.S.S. Ganges which was then in the West Indies. He was charged with using "ill language" to Lieutenant H. E. Banbury, commander of the Eagle in the presence of the officers and crew of that vessel. Surgeon Webb was convicted and sentenced to be cashiered. He was paid his wages and landed at St. Kitts.[77]

In 1804, a seaman named Robert Quinn (also reported as Quinn) was charged with being the author of the following letter which was addressed to Commodore Barron of the U.S.S. President.

> The horrid usage that has been carried on in this ship of late by the principal officers, is enough to turn every Lass [sic] Heart to wickedness, we are kept on Deck from 3 o'Clock in the morning until 8 at night there is [sic] no regulations in any one thing. We have been kept on deck for several days without one bit of Victuals, and durst not look for it, we cannot wash a single article for fear of being cut in two, you expect every thing done at a word, there is no allowance made for our . . . day and night, but the time will come when you will drive all thoughts of fear out of our minds, tyranny is the beginning of all mischief, and generally is attended with bad endings [sic] at the latter end, any Commander or Captain that had the least feeling or thought, would not suffer this horrid usage, it is almost impossible for us to live. The President is arrived to such a pitch as to exceed the Xerxeians, some of our friends in America and other parts shall know this shortly and in time we hope to get redress, Death is always superior to slavery.
>
> We remain your
>
> Unhappy Slaves[78]

Quinn (or Quinn) was convicted and sentenced to have his head and eyebrows shaved, to be branded with the word "mutinous" and to be flogged through the squadron to a total of 320 lashes and to be drummed out of the service.[79]

In the next year, 1805, on August 16, a midshipman named William Reid, serving aboard the U.S.S. Constitution was charged with writing a

"malicious and false letter to the Commodore" (Preble). On board the Constitution at anchor in Tunis Bay he was convicted by court-martial and sentenced to be dismissed from the service.[30]

I believe that the evidence is conclusive that the limits placed on the First Amendment freedoms of speech, assembly and petition in the regular land and naval forces during this period were strict and necessarily so. The interest of discipline required this. The actual infringement of freedom of religion is uncertain although the Navy had by far the most rigid regulations governing it. It can only be presumed that attendance at worship services was considered by the Navy to have a salutary effect on discipline. Freedom of the press had not yet become an issue.

This brings a consideration of the extent to which First Amendment freedoms were restricted for those in military service during the War of 1812. The Navy remained small and experienced no great upsurge of these freedoms among those in its service. The story was quite different with the land forces. The war was fought largely with state militia called into federal service and with volunteers enlisted directly into Federal service; neither group was in any sense of the word, Regular Army. The regular forces were, however, expanded

The militia when it came into federal service virtually knew not the meaning of restrictions on such freedoms as speech, assembly and religion. In 1812, the militia at Urbana in Ohio with General Hull were "unruly." One company of them, unhappy with the severity of one of the officers, took him out one night and rode him on a rail.[31] This same militia had to be forced at bayonet points of the Regulars to take up the march from Urbana toward Detroit.[32]

Much the same spirit prevailed among the volunteers and militia with whom General Smyth hoped to invade Canada in 1812. Upon learning that the decision had been taken to invade, against the advice of the officers of the militia and volunteers, these two bodies of troops dissolved into a mob. Smyth himself was subjected to "bitter reproaches and indignant epithets" from these soldiers.[83] A major part of the problem was the fact that the militia still elected their officers and these officers were, as a consequence, "obsequious" to the men under their command.[84]

However, the lessons of the Revolutionary War were not entirely lost and by the end of the War of 1812 at least part of the militia and the volunteers had been made accustomed to necessary curtailment on speech, assembly and petition. A good example of this is the experience of Andrew Jackson with militia and volunteers. As one author has described Jackson's approach, "Between semi-annual musters at Nashville, which began with a proclamation and wound up with a barbecue, and an actual camp, with soldiers' fare and accommodations and Andrew Jackson's modes of discipline, there was the widest and most salutary difference."[85]

It is recorded that at Natchez on February 22, 1813, General Jackson issued the following order to the troops under his command.

> The Major-General Commanding is proud to take it for granted that every Volunteer in his division is a gentleman at heart. But of late some reports have come to headquarters of certain conduct which, though hardly to be called culpable, yet affords indications of a disposition to heedless mischief which causes the Commanding officer great regret.
>
> Such conduct might indeed be expected of hired soldiers such as our enemies bring against us from the jails of Europe, but not of Volunteer Gentlemen of Tennessee. The Major-General therefore hopes that such mischievous conduct may forthwith cease. Should it not,

> he feels it his duty to say that persistency will lead to measures on his part summary in character and exemplary in effect.[85]

Nevertheless, Jackson was, for a time, plagued by what has been described as an, 'almost constant state of discontent, often amounting to open mutiny.'[87] The same author explains that, 'This state of things was inseparable from the character of the men composing his force, the lessenness or vagueness of their articles of enlistment and the distressing physical conditions under which they had to serve.'[88] (emphasis mine) The author then describes Jackson's response in words that must be quoted:

> At first Jackson, himself full of the notions of popular freedom and individual independence, tried to suppress these disorders by eloquent addresses and fervent proclamations to his men. But a little experience taught him that military law is not a matter for argument or expostulation, and when he had once deliberately adopted this conclusion his application of the grim processes of court-martial and firing-party was as drastic and effective as his previous speeches and proclamations had been eloquent and useless. The faculty of rigid discipline that made the army of New Orleans what it was had been acquired in the forests of Alabama.[89] (emphasis mine)

The small regular forces that were retained after the close of the War of 1812 seem to have continued the pre-war discipline which strictly regulated freedom of speech and assembly and to a certain extent petition, although as we will see, petitions to the Congress for any number of causes were frequent. The status of freedom of religion seems to have remained much as before. The Army was engaged in the work of coastal fortification, western exploration and combat with the Indians, both in the West and in Florida. The Navy was involved in the suppression of piracy and the slave trade and the policy of Pacific exploration and showing the flag.

There was still the difference between Army Regulars on the one hand and volunteers and militia on the other in the matter of discipline and its influence on First Amendment freedoms. During the Second Seminole War, a Regular commented that volunteers and militia were, "well known from lack of discipline to be almost useless."[90] This is in contrast to the discipline enforced in the Regular Army, including the officers. General Eustis refused to grant to volunteers and militia the same attention and flatteries as other generals had done, even though many a Southern gentleman was a private of militia or volunteers. "But Gen. Eustis of the regular army could not be made to see or know any such distinction. If a gentleman came as a common soldier, he was treated by him fairly but not flattered and no liberties were allowed."[91]

Another enlisted man in the ranks of the Regular Army during this period (1845) gives a graphic description of how speech was restricted.

> As I was about to sit down to my first breakfast on Governor's Island, a recruit, Sawney, belonging to New York, one of the "boys" as they delight in being called, and a recognized and privileged wit among recruits, volunteered to ask a blessing. It was evidently a preconcerted arrangement with several of his influential friends, who used all their address, and a considerable degree of exertion to obtain silence. Having finally succeeded, Sawney rose with a face of the utmost gravity, and commenced a profane and irreverent parody. He concluded by d--g all those influential scoundrels who rob poor soldiers of their rations; amen. "Sawney, get up, and go to the guardhouse," said a sergeant who entered as he sat down, after finishing this singular grace. 'Ay, ay,' grumbled Sawney, 'I expected as much; I said how it would be. If a poor devil wants to be ever so religious, it's no use of trying it here. I suppose that's what you call liberty of conscience in this blessed free republic of ours."[92]

During this period between the end of the War of 1812 to the beginning of the Mexican War, some of the army posts on the western frontier were inspected by Colonel George Croghan. His comments on the

state of discipline at these posts in general bear out the impression of an army where strict discipline was maintained.[93]

Evidence of the Army's efforts at keeping necessary restrictions on the freedom of speech in this period can be found in an order issued by Winfield Scott to the Army in 1842. Paragraph 5 of the order stresses that,

> For insolent words, addressed to a superior, let the soldier be ordered into confinement. This, of itself if followed by prompt repentance and apology, may often be found sufficient punishment. If not, a court can readily authorize a final remedy.[94]

Paragraph 7 warns officers and others in authority that,

> Harsh and abusive words, passionately or wantonly applied to unoffending inferiors, is [illegible] but a little less vulgar and unmanly; and, in this connection it may be useful to recall a passage from the old General Regulations for the Army (by Scott). "The general department of officers toward juniors or inferiors will be carefully watched and regulated. If this be cold or harsh, on the one hand, or grossly familiar on the other, the harmony or discipline of the corps cannot be maintained. The examples are numerous and brilliant, in which the most conciliatory manners have been found perfectly compatable with the exercise of the strictest command; and the officer who does not unite a high degree of moral vigor with the civility that springs from the heart cannot too soon choose another profession in which imbecility would be less conspicuous, and harshness less wounding and oppressive."[95]

The Navy was apparently equally strict on its officers in the matter of speech. In 1816, Captain Oliver H. Perry was tried by court-martial aboard the United States frigate Java in the harbor of Port Jahen for striking John Heath, a captain of marines and for using the "most abusive and unwarrantable" language to Captain Heath, consisting of the words that Heath was a "damned rascal and scoundrel, and had not acted like a gentleman." Captain Perry was convicted and sentenced to receive a private reprimand. The punishment was light because Perry had sought to make amends to Heath.[96]

What was virtually the same court tried Captain Heath for use of improper language toward Captain Perry and for disobedience of orders in failing to cease such language. This was apparently the same incident out of which arose the charges against Perry. The court convicted Heath and also sentenced him to a private reprimand.[97]

It is in this period that the first indications of potential conflict between freedom of the press and army policy appear. In 1837, a court of inquiry met to consider certain published communications by officers in regard to army operations against the Seminole Indians. These consisted of a letter from a Captain Hitchcock to Representative Lyon of Alabama which was published in the "Globe", a published letter to the "Globe" from Major General George A. Jesup, a published letter from Hitchcock to the "Globe" and a letter from a Captain McCall to the New Orleans "Bulletin" which was published in the "Army and Navy Chronicle." The Hitchcock-Lyon letter was found not to be in conflict with army regulations since it merely detailed the military operations of General Gaines and was written with his approval. It was found not to contain "statements or reflections injurious to the public service." The other three letters were also found not to violate regulations, seemingly for similar reasons.[98]

The Army had, apparently, even less objection to its officers publishing correspondence of a political nature: General Winfield Scott in 1833 wrote a letter to a leader of the Virginia legislature against both nullification and secession, "containing politico-military views and arguments not likely to occur to the minds of many civilians." The letter was published in Virginia newspapers and Scott credits it with having "a considerable effect in preventing Virginia from plunging into the South Carolina vortex."[99] In 1839, Scott also engaged in correspondence and

other activities related to his being considered as the Whig candidate for the Presidency [100]

The freedom of those in military or naval service, at this time, to petition the Federal government outside military channels was frequently used. Apparently, it was accepted practice, whether relating to such matters as pay scales over which Congress exercised complete control or over grievances about conditions within the services themselves.

In 1826, one brevet major and twelve captains stationed at Fortress Monroe petitioned Congress to protest the fact that captains' pay had not been increased commensurate with other ranks. They also complained of the fact that the "emoluments and privileges" of that rank were decreased while its responsibilities were increased. The petitioners did not consider their communication a demand, but merely a submission of a request to the "justice and liberality" of the Congress.[101]

In 1832, twenty-five army officers petitioned the House of Representatives to defeat a bill which had been introduced to abolish brevet rank. In closing the petition, the officers expressed their pleasure at having it "in their power to appeal, in support of their views."[102]

In the same year, a Lieutenant John Williamson petitioned Congress to review his court-martial conviction. He claimed to have been punished for a crime other than that of which he had been accused.[103]

In 1834, twenty-seven army officers petitioned the Senate in protest against a bill which had been introduced to tax officers' pay to support the widows and orphans of officers who died while in the service. Extensive figures were presented to show the injustice of the scheme.[104]

In 1837, eighteen senior non-commissioned officers petitioned the House of Representatives and the Senate to provide for a procedure whereby

certain non-commissioned officers could be commissioned since "for the last eighteen years [West Point] furnished all the commissioned officers for the Army, to the total exclusion of every enlisted soldier, no matter what his services, qualifications, or merit have been; which in the opinion of the undersigned, is contrary to the true spirit of the Constitution of our country and in opposition to all our republican institutions."

They also ask that the pay of the higher grades of non-commissioned officers be increased. The tone is quite conservative and the petition is in no sense a demand.[105]

Petitions from the Navy seem to have been even more prolific and to have presented subjects of a more delicate nature. In 1817, and 1818, two separate petitions were presented to the Congress concerning the state of affairs in the squadron of American warships in the Mediterranean.

In January of 1817, a petition of forty-one naval officers below the rank of commander and above that of midshipman was presented to the Senate. It grew out of the events surrounding the courts-martial of Captain Perry and Captain of Marines Heath, mentioned above. It was based on the treatment accorded Heath by Perry and the fact that Perry remained in command while Heath was confined to his quarters aboard ship while each was awaiting trial and the fact that, as far as the petitioners knew, Perry's conduct was virtually sanctioned by the court-martial. For these reasons, they felt that they had, "no guarantee for the safety of their persons, but the use of those arms which the laws of their country have placed in their hands, and that personal strength with which nature had blessed them." They also complained of the Creighton-Marston affair which will be discussed below. They asked that the Senate

look into the entire situation. Again, the petition was couched in very conservative language and was not a demand.[106] It is of interest to note that the Senate Committee of Naval Affairs found the existing naval laws and regulations sufficient to prevent the evils feared by the petitioners. Any problem, the committee felt, was in the enforcement of the laws. Therefore, it chose to take no action, but stated that it would "frown with indignation on every act which savored of oppression or mal-administration."[107]

In 1828, fifty-four midshipmen petitioned President Monroe because of an incident between Captain J. O. Creighton of the U.S.S. Washington and a midshipman of that vessel, John Marston. Captain Creighton was charged with striking Marston and threatening to throw him overboard. There was independent testimony that Captain Creighton in fact struck Marston, but the court-martial acquitted Creighton and found that Marston prosecuted with "malicious motives" of which the court expressed its "decided disapprobation."[108] The fifty-four midshipmen were emphatic that they in no way "intended or desired that demonstration, or any thing of an inflammatory nature, shall take any part or have any place in this measure; nor is there any individual person upon whom they wished to vent a splenetic spirit." Nevertheless, they clearly stated their feelings that the naval laws did not protect them from personal injury from the few (they hoped) officers who were disposed to "infringe upon" their feelings or "do violence" to their persons.[109] The House of Representatives debated the general subject matter of the petition but nothing came of the debate.[110]

The naval petitions also pertained to such mundane matters as pay increases. In 1827, forty-nine lieutenants petitioned Congress for an

increase in their pay. Among the signatures appear those of David G. Farragut, Franklin Buchanan and Samuel F. DuPont.[111]

In 1828, the surgeons and surgeon's mates of the Navy petitioned for pay increases and other changes in their lot. The petition was addressed to the Congress. As was customary, the petition was conservative in tone and expressed "unfeigned deference to the wisdom of Congress."[112] Also in 1828, the captains and masters commandant of the Navy petitioned for an increase in their pay. Among the signatures are found those of Thomas Ap Catesby Jones and Matthew C. Perry.[113]

In the matter of freedom of religion, the Army apparently continued to recommend in the Articles of War that those in its service participate in worship services. However, the Army apparently had no organized system of providing chaplains for its widely scattered commands. In 1836, a Lieutenant J. S. Gallagher corresponded with Senator Benjamin Swift with a view toward providing funds to various posts that might want them, so that supplemented by contributions of interested individuals at the posts concerned, clergymen might be employed to provide religious instruction to those who desired it. There is no suggestion in this plan of making the attendance compulsory, in fact, its voluntary nature is stressed.[114]

There were, however, those in the Army who wished to see attendance at worship become compulsory. Also in 1836, a Lieutenant Colonel J. M. Vose of the Third Infantry wrote to Senator John Davis stating that, "where the Sabbath is properly observed, and public worship held . . . there are few desertions, less intoxication, and a more healthy and efficient command." Vose went on to say that, "Let there be chaplains appointed for every military post, and let officers as well as men, be required to attend public worship on the Sabbath, and we shall see very soon,

an astonishing change in the moral character of our army."[115]

Although chaplains were eventually provided on a regular basis, there is no evidence that attendance at worship ever became compulsory as a matter of army policy. Given the views of officers like Vose, however, there can be little doubt that attendance at worship in the Army's scattered commands must have been less than voluntary at times, depending on the temper of the officer in command.

John Semmes, to whose "reminiscences" reference has already been made, makes it fairly clear that the practice of religion, compulsory or otherwise was not to be found among those with whom he made acquaintance in the Army of this period.

> I look back and out of the 5000 soldiers I knew in Florida I cannot say truly that I knew one who loved or acknowledged in any way the Lord. I only remember one man that made even a profession of Christianity and that man was our commander, Gen. D. L. Clinch.[116] All others as far as I saw were heathen like myself.[117]

George Ballantine in his autobiography makes it even clearer that it was not uniform army policy to require attendance at worship.

> While we lay at Fort Adams, we had church service performed in one of the barrack rooms every Thursday evening, by a Methodist preacher from town. This was in consequence of the distance being too great to march the men to church in town upon Sunday. The attendance not being compulsory, very few of the men went, but our officers with their wives and children, attended regularly, with as many of the men as they could persuade, a thing which they sometime tried but with indifferent success. I recollect hearing a Lieutenant ask one of the men, whom he met in the square as he was going over to church service, if he would not come over and hear a sermon. "Heaven forbid, sir,' was the reply of honest Dennis O'Toal, a minster man, and a staunch Catholic. 'Mh! what's that you say, Dennis?" said the Lieutenant, in a bantering tone. "Sure, Lieutenant, the Blessed Virgin knows I'm had enough already, without sinning my soul any more by going to hear a swaddling preacher mocking the holy religion," was the reply of Dennis; at which the Lieutenant's wife lifted up her eyes in

pious horror, while the Lieutenant himself went away laughing heartily.[117]

The Navy was not so liberal as the Army in matters of religion. From 1799, attendance at divine service aboard ship had been compulsory, although on shore stations it had generally been voluntary.[118] This would not change until the War Between the States. The Navy by this period had regular chaplains.[119]

Concerning religion, what we have been talking about up to this point is both "establishment of religion" and part of the "free exercise" of religion. The concept of chaplains in the military service have never been successfully challenged as being violative of the First Amendment prohibition against Congress making a law "respecting an establishment of religion." And, by this time, the Army had clearly moved toward the freedom of those in the military service not to be required to attend church. In the Navy this would have to wait until the War Between the States. But, what of the man who wished to practice his religion, when that religion did not happen to be the same as that of the chaplain. This was a real problem, because the statutes governing the appointment of chaplains in the Army[120] and Navy[121] did not provide for non-Christian chaplains until 1862 in the Army and 1893 in the Navy. The Navy did not even have a chaplain of the Roman Catholic faith until 1888.[122] If the man could attend civilian religious service, the problem was solved. But, if not, as for example on board a ship at sea, a real problem with the free exercise of religion existed. The military personnel were where they were, in the final analysis, by an act of Congress, "a law." As we shall see, in time, this problem was, to some extent, solved. However, at this period it remained in my opinion a grave violation of the First Amendment.

The War with Mexico again reflected the vast difference between the freedoms of the regulars and the citizen soldiers. The regulars who had more intelligence and education "required a stump speech to get the simplest order obeyed."[123]

CHAPTER II

THE FORMATIVE YEARS

The War Between the States 1861-65

The War Between the States and the years of isolation experienced thereafter[1] by the military were one of the two great watersheds for the American military establishment. The other was World War II and the Cold War that came in its wake. The discussion of First Amendment freedoms of the military from 1861 to 1865 sets the pattern which will be used for each of the remaining seven periods of time. In so far as it is possible to separate them (and it will not always be possible, as overlap does exist), the First Amendment freedoms will be grouped together as follows for purposes of discussion: speech and press, assembly and petition, and, last, religion. For each of these groupings, the experience of the land forces and the naval forces will be considered together. Consideration begins with a look at the Articles of War and the Articles for the Government of the Navy (combined as the Uniform Code of Military Justice for the periods after 1950) which were in effect during the specific period. Reference will then be made to evidence of actual practice during the period, including judicial proceedings, the experiences of those in the military during the period, and scholarly comment about the period.

In discussing the period 1861 to 1865, emphasis will be on the Union land and naval forces. Any reference to the armed forces of the Confed-

eracy will be brief and for purposes of contrast only. The Confederate Constitution guaranteed in like manner these freedoms protected by the First Amendment to the United States Constitution, but the scope of these freedoms in the Confederate military is not in the main stream of this discussion.

The Union Army was governed by the Articles of War of 1806 as amended.[2]

The Freedoms of Speech and Press

The articles that limited freedom of speech of those in the Army differently either in nature or degree from these limits generally applicable in civilian society were Articles 3, 5, 6, 7, 23, 24, 83, and 99.[3]

> Article 3.
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> Any non-commissioned officer or soldier who shall use any profane oath or execration, shall incur the penalties expressed in the foregoing article; [see below] and a commissioned officer shall forfeit and pay, for each and every such offence, one dollar, to be applied as in the preceding article.[4]

> Article 5.
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> Any officer or soldier who shall use contemptuous or disrespectful words against the President of the United States, against the Vice-President thereof, against the Congress of the United States, or against the Chief Magistrate or Legislature of any of the United States, in which he may be quartered, if a commissioned officer, shall be cashiered, or otherwise punished, as a court-martial shall direct; if a non-commissioned officer or soldier, he shall suffer such punishment as shall be inflicted on him by the sentence of a court-martial.[5]

> Article 6.
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> Any officer or soldier who shall behave himself with contempt or disrespect toward his commanding officer, shall be punished, according to the nature of his offence, by the judgment of a court-martial.[6]

> Article 7.
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> Any officer or soldier who shall begin, excite, cause, or join in, any mutiny or sedition, in any troop or company in the United States, or in any party, post,

detachment, or guard, shall suffer death, or such other punishment as by a court-martial shall be inflicted.[7]

Article 23.
Any officer or soldier who shall be convicted of having advised or persuaded any other officer or soldier to desert the service of the United States, shall suffer death, or such other punishment as shall be inflicted upon him by sentence of a court-martial.[8]

Article 24.
No officer or soldier shall use any reproachful or provoking speeches or gestures to another, upon pain, if an officer, of being put in arrest; if a soldier, confined, and of asking pardon of the party offended, in the presence of his commanding officer.[9]

Article 83.
Any Commissioned officer convicted before a general court-martial of conduct unbecoming an officer and a gentleman, shall be dismissed from the service.[10]

Article 99.
All crimes not capital, and all disorders and neglects which officers or soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offence, and be punished at their discretion.[11]

There was a complete revision of the Articles for the Government of the Navy in 1862. Arranged quite differently from the Articles of War, those applying to freedom of speech or press are listed in so far as possible in the same order for comparison with the Articles of War previously listed:

Article 8.
Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy--
FIRST. who is guilty of profane swearing . . . or any other scandalous conduct tending to the destruction of good morals
SIXTH. Or treats his superior officer with contempt, or is disrespectful to him in language or deportment, while in the execution of his office.[12]

Article 4.
The punishment of death, or such other punishment

as a court-martial may adjudge, may be inflicted on any person in the naval service--

FIRST. Who makes, or attempts to make . . . any mutiny.[13]

Article 8.

EIGHTH. Or utters any seditious or mutinous words.[14]

Article 4.

SIXTH. Or, in time of war . . . entices others to desert.[15]

Article 8.

TWENTY-FIRST. Or, in time of peace, . . . entices others to desert.[16]

Article 8.

THIRD. Or . . . uses provoking or reproachful words, gestures, or menaces toward, any person in the Navy.

FOURTH. Or endeavors to foment quarrels between other persons in the Navy.[17]

Article 22.

All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court-martial may direct.[18]

It is of interest to note that there were, at this time, no naval equivalents to either Article of War 5 or Article of War 53. Such offenses as contemplated by either of these Articles would, in all likelihood, have been prosecuted under Article 22 of the Articles for the Government of the Navy (the general article). As was the case with the Articles of War, none of the Articles for the Government of the Navy dealt specifically with freedom of the press. In both the Army and the Navy, restrictions on freedom of the press would have to be based either on the general article (Article of War 99, or Article 22 of the Articles for the Government of the Navy), or violation of an order or regulation that limited freedom of the press.

The members of the Army maintained by the nation before the War Between the States had come to accept, as part of the price for discipline, rather stringent restrictions on their First Amendment freedoms, especially

speech and assembly. These forces were, of course, not nearly enough to preserve the Union when Southern legislatures began passing ordinances of secession. President Lincoln from the first, had to call for volunteers, augmented by militia units called into Federal service. Later, conscription had to be used. The Navy, although it was expanded greatly, did not suffer to the same extent from the influx of new personnel. It is not surprising that the Army provides most of the examples of the struggle to enforce limitations on the freedom of speech. Freedom of the press had not, as yet, become an issue.

Disrespect for military superiors.

Disrespect for superiors was the principle problem. The Army volunteers and militia, who were really civilians in uniform, were not at all disposed to accept readily restrictions on their freedoms, especially that of speech. Although discipline generally got better toward the end of the war, violations of Articles 5 and 6 were a problem throughout the entire course of the conflict.

Bell Irvin Wiley in his classic work on the life of the common soldier in the Union army notes that because of the civilian soldiers' dislike of discipline and the incompetency of their officers, "Insubordination was shockingly prevalent during the early period of the war."[19]

Wiley gives numerous examples of the insubordination encountered by those in authority. A private in a Michigan regiment told his captain, who had just ordered him to extra duty for disobedience, "You are . . . damned trash. You think you can do just as you . . . damn please because you are officers. I'll be — . . damned if I will [perform the duty] . . . I'll see you in hell before I will." When ordered to keep

silent while in the guard house serving a sentence, a soldier replied to the officer, "I will not keep quiet for you, you . . . damned low-lived son of a bitch." There are several other instances given. All resulted in the soldier being tried by court-martial.[20]

The results of the citizen soldiers' ingrained ideas of being free to say what he pleased were aggravated by the poor quality of many of the officers, especially early in the war.

> To bow in meek submission to the undeserved authority of the civilian, or to the soldier whose record was such as not to command the respect of his fellows, was the lot of thousands of intelligent and brave soldiers, the superiors in all respects save that of military rank along of those self-save officers; and to be commanded not to answer back, when they felt that they must utter a protest against injustice, was a humiliation that the average volunteer did not fully realize when he put his name to the roll--a humiliation which grew bitterer with every new indignity. Punishments or rebukes administered by social inferiors were galling even when deserved.[20]

The Confederate Army seems not to have taken insubordination as seriously. Albert T. Goodloe who was a lieutenant in the Thirty-fifth Alabama describes an incident where, in order to enforce march discipline when in close proximity to enemy forces, he threatened to arrest one of the enlisted men in his company. Taking offense, the man told Lieutenant Goodloe, "You can command me now, but I will see you after the war is over." The lieutenant says that he took no offence at this remark and the enlisted man was "seen ashamed of it."[21]

A Private Herman who served in the Confederate Army as a bugler tells of another private standing guard duty who was unable to receive medical attention for a sudden chill because the company officers were at a drinking party and the surgeon was already drunk. When he recovered from the chill, the private was outspoken in his criticism of the officers

and was, for these remarks, required to wear a ball and chain for twenty-four hours. Herman, upset by this treatment of his friend, wrote up a humorous "program of intoxication" describing the officer's conduct and "posted" it along with the official announcements in the company area. The lieutenant in temporary command of the company became upset, but in the end Herman's only punishment was to be relieved as bugler.[22]

Perhaps the spirit of the citizen soldier is best summed up by William Forse Scott in Story of a Cavalry Regiment.

> the volunteers were not hireling soldiery, but free and independent American citizens. This spirit, the necessary result of American institutions, was hard to control in the Army. Indeed it was never wholly controlled, though it was slowly subordinated to higher considerations, through that good sense which hard experience taught the volunteers. Gradually, they learned the value, the necessity of discipline.[23]

The Union Navy was not entirely without such problems. In September, 1862, Admiral S. F. DuPont commented that "the exigencies of war have caused vessels to be armed and officered by persons who never were in the Navy before, either as commanders or subordinates; it must therefore occasionally happen that the former have no knowledge or experience in controlling their officers and crew, and the latter no conception of that discipline, subordination, and respect to authority which constitutes the difference between a man-of-war and a passenger ship."[24] A month later, DuPont had occasion to complain to Assistant Secretary of the Navy Fox about an engineer officer who was guilty of a "gross piece of insubordination."[25] DuPont was determined not to let "discipline run down as it does in the Army."[26]

Disrespect for governmental institutions.

The Army experienced problems of a potentially much more serious nature (although not nearly so frequent) in violations of Article of War 5, dealing with expressions of contempt against the institutions of government. According to Winthrop, most of the violations of this Article consisted of "denunciatory language" against President Lincoln or his administration or, once in a while, the President and Congress together. There was only one case involving a state governor and there the accused was acquitted.[27]

Although the violations of Article 5 were almost all of a political character,[28] not all such language was considered a violation of the Article. Political discussions which resulted in 'adverse criticism" of the President even though couched in intemperate language, were not made subject to prosecution, if they did not seem to be intended, "to be disrespectful to the President personally or to his office, or to excite animosity against him." It was felt that to do so would be "inquisitorial and beneath the dignity of the Government."[29] The difference seems more apparent than real. In any event, "the deliberate employment of denunciatory or contumelious language in regard to the President, whether spoken in public, or published, or conveyed in a communication designed to be made public, [was] in repeated cases . . . made the subject of charges and trial . . . and where taking the form of a hostile arraignment, by an officer, of the President or his administration, for the measures adopted in carrying on the civil war--a juncture when a peculiar obedience and deference were due, on the part of the subordinate to the President as executive and commander in chief--was in general punished by a sentence of dismissal."[30]

On several occasions at the very close of the war, military person-

nel were charged with "public exulting over or justifying of" Lincoln's assassination. The charges, however, had to be brought under Articles 99, the general article.[31] This procedure clearly indicates the evils sought to be corrected by Article 5.

Profanity.

The Army and Navy prohibitions against swearing and profanity (Article of War 3 and Article 8 (FIRST) of the Articles for the Government of the Navy) were by this time virtual dead letters. Bell Irvin Wiley states that,

> One of the most common evils of the camp [in the Union Army] was profanity. A New Englander serving on Staten Island in the fall of 1861 reported that "swearing is almost universal," while a Chicagoan stationed near Memphis observed: "The swearing especially is terrific, and even to a man accustomed to hear bad language, and with sensibilities not very easily shocked, it is really disgusting. The worst characters of the worst dens up North, I am afraid, would have to yield the palm for profanity to the gallant army of the South-west."
>
> Articles of War forbade the use of profanity . . . But little attention was paid to the prohibition, and commissioned personnel, far from enjoining their men, seem rather to have set an undesirable example in the use of oaths and execration.[32]

The average sailor was probably every bit as profane as his counterpart in the land forces. It was, however, reported by a Navy chaplain in 1862 that the custom of the officers using profanity to "encourage" the sailor in his labors had markedly decreased from 1828 when the chaplain first went on duty. He contended that over the past ten years prior to 1862 in the two vessels in which he had served, he did, "not recollect to have heard an oath; and scarce a reproachful epithet, from an officer in charge of the deck or from his subordinates."[33]

Since swearing in the presence of a man of the cloth is rare, it is safe to assume that by the time of the War Between the States, those in military service could swear the most fearsome oath with virtual impunity so long as it was not directed at a superior in his presence or obviously intended to degrade the institutions of government. No doubt some commanding officers and captains of naval vessels, especially those who were deeply religious, tried to enforce the ban on profanity. It is doubtful if there were many who went to the trouble and probably fewer still were able to effectively stamp out swearing in their commands.

Other restrictions on speech.

The other restrictions on speech, forbidding those in military service from inciting mutiny or counseling desertion and prohibiting officers and soldiers from making provoking or reproachful speeches, were probably used infrequently, not because they were considered archaic in the manner of the ban on profanity, but because there were probably fewer occasions when they were actually violated. Only a few cases of counseling desertion seem to have occurred, esp. one in the Department of the Missouri in 1863 and an aggravated type, counseling by an officer of a soldier to desert from his present unit and join the unit of the officer doing the counseling. The officer was, however, acquitted.[34] No cases of this type were found for the Navy during this period.

Likewise, no instances were found of prosecutions for using "provoking or reproachful words" or endeavoring "to foment quarrels between other persons in the Navy." These provisions in the Articles of War and Articles for the Government of the Navy were part of the prohibition against dueling, which, by 1860 was pretty well passe.[35] These provisions

also served to preserve harmony within the military and naval organizations.

In the Army, the "conduct unbecoming" article, Article 83, and the general article, Article 99 of the Articles of War, were rather widely used during this period to restrict the freedom of both speech and press when they were "to the prejudice of good order and military discipline." In regard to speech, the following are examples:

a. For one officer to use insulting or defamatory language, without justification, to another officer, or of him in the presence of other military persons.[36]

b. For an officer to write or publish false or libelous matter in regard to another officer.[37]

c. An officer couching his resignation in disloyal language.[38]

d. The expressing of "disloyal sentiments" by an officer.[39]

e. While confined as prisoner of war, an officer using disrespectful and insulting language to a superior in the presence of other officers and soldiers who were also prisoners of war.[40]

f. Disrespect by an officer and contempt toward an officer of the provost guard in Washington.[41]

An example of limits of freedom of the press under Article 99 would be, "Publication (by an officer) in newspapers, pamphlets, etc., of strictures upon the acts or conduct, official or personal, of officers."[42]

No examples of the use by the Navy of Article 22 of the Articles for the Government of the Navy have been located. Such use of Article 22 undoubtedly occurred, probably in a fashion quite similar to that of the Army use of Article 99 of its Articles of War.

The military services and their civilian superiors in the executive and legislative branches of government were not capricious in the limits

they placed on these freedoms. And, in the instances where restrictions placed on the statute books proved to be unnecessary, if not unwise, they soon came to be virtual dead letters. Thus, by the close of the War Between the States, the restrictions on freedom of speech and press placed on people in military service were reduced to those made necessary by the special circumstances of military society. Respect for superiors, vital to the integrity of a military organization came to be enforced more or less uniformly throughout the military services for the first time in a situation when the small professional Army came to be expanded with citizen soldiers to meet the needs of war. Often such curbs as were required to uphold respect came hard to the civilian in uniform, but, by and large they did, after a struggle, come. This is not, of course, to say that the soldier or sailor was all deference to his superiors; no American military organization, especially when filled with civilian soldiers or sailors ever has been and probably never will be. But, no longer would the wholesale disrespect and insubordination found in the past be tolerated. The American citizen military organization had begun to come of age. The Union Army of the War Between the States had showed improvement over the Continental Army of the American Revolution.

Respect for the institutions of government was also enforced. Not only was this necessary for the good internal order of military society, but it was also crucial to the concept of control of the military by the civilian government.

On the other hand, the military society, or at least most of it, had realized that there was no real reason to attempt to control such individual speech traits as profanity and cursing. These matters had no

real relationship to discipline and therefore, for the most part, any attempt to enforce the prohibitions against cursing and profanity were dropped.

The other restrictions on freedom of speech and press, while of importance to military society were relatively little used because they were violated with comparative infrequency. The wheat had been separated from the chaff.

The Freedoms of Petition and Assembly

Permissible petition.

The Articles of War went to rather great length to assure that military personnel would be able to seek redress for grievances. Article 34 provided that

> If any officer shall think himself wronged by his Colonel, or the commanding officer of the regiment, and shall upon due application being made to him, be refused redress, he may complain to the General Commanding the State or Territory where such regiment shall be stationed, in order to obtain justice; who is hereby required to examine into said complaint, and to take proper measures for redressing the wrong complained of, and transmit, as soon as possible, to the Department of War, a true state of such complaint, with the proceedings thereon.[65]

Article 35.

> If any inferior officer or soldier shall think himself wronged by his Captain or other officer, he is to complain thereof to the commanding officer of the regiment, who is hereby required to summon a regimental court-martial, for the doing justice to the complainant; from which regimental court-martial either party may, if he thinks himself still aggrieved, appeal to a general court-martial. But if, upon a second hearing the appeal shall appear vexatious and groundless, the person so appealing shall be punished at the discretion of the said court-martial.[66]

Article 32.

> Every officer commanding in quarters, garrisons, or on the march, shall keep good order, and to the utmost of his power, redress all abuses and disorders which shall

be committed by any officer or soldier under his command.[45]

Surprisingly, there are no provisions similar to these in the Articles for the Government of the Navy. The Navy Regulations did, however, make it possible for sailors to make their complaints known.[46] Neither the Articles of War nor the Articles for the Government of the Navy, explicitely prohibits one in military service from seeking redress of grievances outside of military channels, so long as there is no violation of the Articles.

The matter of assembly is a delicate one in the military services because few things can be so quickly detrimental to discipline as an assembly of soldiers or sailors come together to seek redress of grievances or for other purposes inimicable to the good order so important to military society. Assembly which threatens in any way the control of subordinate by superior is almost, by definition, a mutiny. This is one reason why the Articles of War and Navy Regulations went to such great lengths to establish procedures whereby grievances could be redressed. These rather cumbersome procedures did not work very well, but they represented a real effort to channel grievances and keep them within the military family thus preventing the frustration of unredressed grievances that can lead to an assembly which, in turn, could easily become a mutiny.

Assembly.

Both services clearly outlawed mutinous assemblies. The Articles of War and the Articles for the Government of the Navy are quite explicit. The Articles of War provide as follows:

Article 7.
Any officer or soldier who shall begin, excite, cause, or join in, any mutiny or sedition, in any troop

or company in the service of the United States, or in any party, post, detachment, or guard, shall suffer death, or such other punishment as by a court-martial shall be inflicted.[47]

Article 8.

Any officer, non-commissioned officer, or soldier, who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or coming to the knowledge of any intended mutiny, does not, without delay, give information thereof to his commanding officer, shall be punished by the sentence of a court-martial with death, or otherwise, according to the nature of his offence.[48]

The Articles for the Government of the Navy cover the same ground in fewer words,

Article 4.

The punishment of death, or such other punishment as a court-martial may adjudge may be inflicted on any person in the naval service—

FIRST: Who makes, or attempts to make, or unites with any mutinous assembly, or being witness to or present at any mutiny, does not do his utmost to suppress it; or, knowing of any mutinous assembly or of any intended mutiny, does not immediately communicate his knowledge to his superior or commanding officer.[49]

These same Articles prescribed lesser types of combinations, which have apparently included assemblies.

Article 5.

Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy—

SEVENTH: Who joins in or abets any combination to weaken the lawful authority of, or lessen the respect due to, his commanding officer.[50]

If Colonel Winthrop (referred to previously) is to be believed, by the beginning of the War Between the States, both Articles 34 and 35 of the Articles of War were virtual dead letters.[51] His thinking does, however, bear out the necessity of limits on the freedom of assembly as a mode of seeking redress of grievances. It was the sentiment of the authorities that where several soldiers have the same grievance, they should not be permitted to combine in a joint complaint, since to allow this "would be

to encourage a mutinous or insubordinate feeling, but that separate and individual complaints only should be entertained."[52]

Most assemblies for the purpose of seeking redress of grievances would not be mutinies, because a mutiny consists of, "an unlawful opposition or resistance to, or defiance of superior military authority, with a deliberate purpose to subvert or prevail over the same."[53] It is Winthrop's belief that most assemblies concerning grievances, "stopping short of overt acts of resistance, or not characterized by a deliberate intent to override superior authority," do not constitute in general the legal offense of mutiny, but are commonly to be treated as "conduct to the prejudice of good order and military discipline," in violation of Article of War 99.[54]

The Navy was not without its problems with grievances and assembly. One provides an excellent example of how grievances, even those that result in concerted action by those aggrieved, can be sometimes handled in a manner beneficial to all concerned. To quote from a letter written by Admiral DuPont,

> There has been some discontent on board of Baxter's Gem of the Sea--a sort of combination against him, followed by resignations en masse. I sent for them and had a quiet, but very firm talk with them, telling them they were new to the service and were not aware what they were doing, that I always preferred to correct things by persuasion and reason than to exercise arbitrary authority unnecessarily, that they had shown a spirit that would authorize me to send them to Fort Warren, for to refuse duty in time of war especially was a very grave offense I then told them I was always ready to listen to any explanations; two of them, the doctor and a master's mate, spoke; the paymaster said nothing. I then told the captain, whom I sent for, that I had sustained his authority and vindicated the discipline of his ship and my squadron, but he must also do his best to have things go smoothly.[55]

On another occassion, DuPont made clear his position on petitions, "I am always ready to forward an appeal, from either officers or men under my command, whether to the Navy Department or to the Congress of the U. S., but these must be couched in proper terms, go through proper channels, and be in conformity with naval usage and military propriety."[56]

The freedoms of peaceable assembly and petition for redress of grievances have always represented a problem for the military services, especially when attempt is made to exercise the two freedoms in conjunction with each other. On the one hand, grievances, especially valid ones, for which the person in military service is not allowed to seek redress have the potential of causing the most unfortunate consequences. However, on the other, the means of seeking redress must be kept within the bounds of necessary discipline or "the cure could be worse than the disease." The attempts to deal with this problem during the War Between the States were not always satisfactory, but, the right to seek redress was clearly recognized. The attitude of Admiral DuPont is one that officers and others in authority in the military and naval services would do well to study.

The Freedom of Religion

The pertinent articles in the Articles of War and the Articles for the Government of the Navy are virtually identical.

> Article of War 2.
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> It is earnestly recommended to all officers and soldiers diligently to attend divine service; and all officers who shall behave indecently or irreverently at any place of divine worship shall, if commissioned officers, be brought before a general court-martial, there to be publicly and severely reprimanded by the president, if non-commissioned officers or soldiers, every person so offending shall, for his first offence, forfeit one-sixth of a dollar, to be deducted out of his

> next pay; for the second offence, he shall not only forfeit a like sum, but be confined twenty-four hours; and for every like offence, shall suffer and pay in like manner; which money so forfeited, shall be applied, by the Captain or senior officer of the troop or company, to the use of the sick soldiers of the company or troop to which the offender belongs.[57]

Winthrop takes the position that this Article is only made advisory while the British Article from which it is taken is mandatory, because of the First Amendment, which, he feels would cast doubt on the constitutionality of a statute obliging those in the Army to attend religious services.[58] This reasoning is of doubtful validity since the 1776 Articles of War, before the First Amendment, also made attendance at religious service optional. Further, the mandatory attendance at religious services in the Navy lasted until 1862. In any event, Winthrop is no doubt correct about mandatory attendance being of quite doubtful Constitutional validity.

Articles 2 and 3 of the Articles for the Government of the Navy covered the same ground.

> Article 2.
> The commanders of vessels and naval stations to which chaplains are attached shall cause divine service to be performed on Sunday, whenever the weather and other circumstances allow it to be done; and it is earnestly recommended to all officers, seamen, and others in the naval service diligently to attend at every performance of the worship of Almighty God.[59]
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> Article 3.
> Any irreverent or unbecoming behavior during divine service shall be punished as a general or summary court-martial may direct.[60]

In the Union Army, the Governmental policy was even more in the direction of free exercise of religion. It is reported that, "the Government naturally took no positive steps to regulate religious activities, except to give certain preachers the title of chaplain."[61] If

much was the attitude of the Government in general, it was not the attitude of some commanding officers in particular. Units in which attendance at Sunday church services was compulsory were not unknown. For instance, in a cavalry regiment, the Third Pennsylvania, those troopers who did not wish to attend the worship on Sunday, were made to fall into formation and taken to the regimental guard house, where they were read the Articles of War,[62] surely a drier bit of recitation than the worst sermon. This sort of thing, however, did not represent the most prevalent practice; usually soldiers were free to attend, or not attend as they chose.[63]

The "free exercise" of religion in a positive sense was another matter. Organized religious activity naturally centered around the chaplains. An enactment that became law on July 22, 1861, provided that,

> There shall be allowed to each regiment one chaplain, who shall be appointed by the regimental commander . . . The chaplain so appointed must be a regular ordained minister of a Christian denomination, and shall receive the pay and allowances of a captain of cavalry, and shall be required to report to the colonel commanding the regiment to which he is attached, at the end of each quarter, the moral and religious condition of the regiment and such suggestions as may conduce to social happiness and moral improvement of the troops.[64]

Chaplains were also provided for certain army posts and for general hospitals, the latter only after May, 1862.[65]

Where the chaplains were faithful to their duties (and often they were not)[66] these in the regiment or so the installation served by a chaplain had the benefit of a man of the cloth to aid them in the exercise of their religious faith. Some of them did, that is: Until July 17, 1862, only Christians could be appointed as chaplains.[67] As a result of this, the Government had refused to appoint a rabbi sought by a regiment

that was principally Jewish, while another Jewish chaplain had been forced to resign.[68] Roman Catholics could, of course, be appointed as chaplains all along, but it is probable that most of the chaplains were Protestant. The upshot of all this was that if there wasn't a Jewish chaplain in the regiment or at least in a nearby regiment, and the Jewish soldier was unable to worship in a synagogue in a nearby community, he wasn't free to fully practice his faith if he felt that a rabbi was necessary for such practice. This denial of spiritual guidance was probably equally trying to Roman Catholics and also to many members of some of the smaller Protestant sects, especially if these smaller sects were quite unique in a doctrinal sense. Some chaplains, no doubt, tried to be of spiritual comfort to members of other faiths, but the adequacy of that sort of thing was something less than promising.

The situation was even worse in the Navy both from the standpoint of freedom not to attend worship service and access to a chaplain of one's own particular faith. In regard to compulsory attendance at worship, such practice had of course been specified in the Articles for the Government of the Navy until 1862. After that, attendance was optional. However, this, as in the Army, probably varied with the officer in command of the vessel or installation.

Things were much worse than in the Army in so far as the presence of chaplains was concerned.

> At no time during the war, after 1861, was the active list of chaplains up to the authorized twenty-four. The average was nineteen, some of whom were not on active duty.[69]

Furthermore, as indicated earlier, during the War Between the States, there were neither Roman Catholic nor Jewish chaplains in the Navy.[70] The exclusion of the Jewish faith from the chaplaincy was caused by a

Navy regulation which specified Christian religious instruction.[71] One is led to wonder why the Navy did not during this period come to remove the ban on Jewish chaplains as did the Army. It can only be supposed that, like an earlier period already discussed, the Navy was less visible and consequently generated much less pressure for change.

It is not difficult to imagine the plight of the sailor of this period if he wished to practice his faith with guidance from one of its clergy; preacher, priest or rabbi. If he was Protestant and fortunate enough to be in a command which had one of the few chaplains, he was in a fairly good situation unless he was a member of one of the smaller Protestant sects mentioned above, or the chaplain was not a dedicated one. If there was no chaplain, he had to settle for sermons or Bible reading from the officer in command. The sailor of the Roman Catholic or Jewish faith was infinitely worse off. Free exercise of religion in the fullest sense had a long way to go.

The Years of Isolation 1865-1917

Following the War Between the States, the military services experienced what Huntington has called the years of isolation.[72] This period lasted until World War I. As Huntington described it,

> Socially and physically the services tended to be separated from society. Until 1890, the small Army was strung out along the frontier fighting Indians. After its brief but inglorious role in the Spanish-American War, substantial segments were required overseas in Cuba, Hawaii, the Canal Zone, and the Philippines. Both these missions divorced it from a nation that was rapidly becoming urbanized. Before World War I, in the words of one officer, soldiers "lived apart in their tiny secluded garrisons much after the manner of military monks and they rarely came into contact with the mass of our citizens." Naval officers likewise had their life apart, spending a large portion of their careers at foreign stations.[73]

The Freedoms of Speech and Press

The Army adopted revised or better, perhaps, rearranged Articles of War in 1874.[74] These remained in force throughout the "years of isolation." The eight articles previously identified[75] as having an influence on freedom of speech or press different in some sense from that prevailing in the civilian community remained intact with slight wording changes in the rearrangement of 1878. They were renumbered, with Article 3 becoming Article 53, Article 5 becoming Article 19, Article 6 becoming Article 20, Article 7 becoming Article 22, Article 23 becoming Article 51, Article 24 becoming Article 25, Article 83 becoming Article 61 and Article 99 becoming Article 62.[76] The Articles for the Government of the Navy did not change during the fifty or so years presently under consideration.

During the years between the close of the War Between the States and the United States' entry into World War I, both military services were composed of Regulars except during the War with Spain in 1898, when some Army Volunteer units were used, and the 1916 punitive expedition into Mexico, when both militia and National Guard units were brought into national service. Discipline as it affected First Amendment freedoms appears to have been rather strict in both services.

In the case of the Army, strict discipline did not, in the years immediately following 1865, make for a happy service. This state was probably not caused so much by the discipline per se as by the adjustments necessitated by the replacement of veteran troops by "green Regular Army regiments," and the hardships suffered by these green troops.[77] However, by 1869, morale and efficiency had greatly improved.[78]

Disrespect for military superiors

In 1877, Second Lieutenant Edward P. Turner of the Tenth Cavalry was tried for a violation of Article of War Twenty for refusing, in a "very disrespectful tone of voice," a request by his commanding officer to put a matter in writing. The words in themselves do not seem offensive, which is proof that the tone of voice can be the difference. Lieutenant Turner was, upon conviction, sentenced to be reprimanded, and, for four months to be suspended from rank and command, fined fifty dollars a month for four months and confined to the post for that period of time.[79]

Surprisingly, many of the cases of disrespect for superiors fall under Article of War 62, the general article.

In 1877, Captain Charles F. Campbell of the Sixth Cavalry stationed at Camp Verde, Arizona Territory, was convicted of conduct prejudicial to good order and military discipline for writing the following letter to the commanding officer of Camp Apache, Arizona Territory.

Maj. W. S. Worth:

> Sir: I have been informed of the manner in which you have acted towards one of my laundresses left at Camp Apache because I had not sufficient transportation to bring her with me.
>
> Under different circumstances, I should endeavor to have you tried by court-martial for your conduct.
>
> I have long since known that you were devoid of all honor, but (until I learn of your late action) I did not think all gentlemanly instincts had left you.
>
> The vindictive feelings you have toward me but dare not exhibit in my presence, you vent upon a poor old woman.
>
> Your conduct is low and dirty, and I consider you an unfit associate for gentlemen.
>
> C. F. Campbell[80]

For his conduct, Captain Campbell received a reprimand. It is, however, of interest to note the reaction of the reviewing authority, Colonel (Brevet Major General) August V. Kautz.

> It is impossible to understand how a court-martial could take so lenient a view of such an offense against military propriety. Let it pass into a precedent that an officer can write such letters to a late commanding officer, with no heavier penalty than a reprimand, then, all who think they have a grievance, and think it revenge to insult and call names, will await a change of station to avail themselves of it, for there could be no restraining influence in a reprimand to a mind that had no higher sense of redress than to write such a communication; for their official acts, commanding officers would be subjected to abuse and insult from non-appreciative subordinates as soon as the latter were beyond their control, and official courtesy and respect for authority would cease to exist in the Army.[81]

For reasons that are not entirely clear, however, both the findings and the sentence were disapproved.[82]

For a rather unique exercise of freedom of speech, a soldier was in 1867, convicted of violation of Article 62 by "joining and parading with an association of Fenians, reported to be in armed hostility to a nation at peace with the United States."[83]

A summary of convictions by all courts-martial (not just general courts-martial) for the fiscal years 1912, 1914, and 1916 indicates that disrespect in the form of speech remained a limitation on First Amendment freedoms that continued to cause problems.[84]

Other limitations on speech

If the information available is to be believed, other limitations on freedom of speech were accepted and seldom resulted in offenses against the Articles of War. For the years 1912, 1914, and 1916 only one violation of Article 19 is reported, that in 1912,[85] while two violations of Article 51 (persuading another to desert) and one violation of Article 53 (profanity) are reported in 1914.[86] In 1916, only two violations of Article 51 are reported, but under Article 62 a whopping 170 cases of profane lan-

usage and creating disturbance were mentioned.[87] One wonders if the latter figure is not the result of the influx of militia and National Guard troops caused by the punitive expedition into Mexico. Given the previous attitude toward profanity, it is likely that the real offense was the creating of a disturbance.

Press

In this period are found the first cases involving restrictions on freedom of the press. In 1878, it was reported that under Article of War 62 (the general article)

> for an officer to print and publish to the Army a criticism upon an official report, made by another officer in the course of his duty to a common superior, charging that such report was erroneous and made with an improper and interested motive, was gravely unmilitary conduct to the prejudice of good order and military discipline. An officer who deems himself wronged by an official act of another officer should prefer charges against the latter or appeal to redress to the proper military authority. He is not permitted to resort to any form of publication of his strictures or grievances.[88]

In the next year it was reported, also under Article 62, "that for an officer to publish or allow to be published in a newspaper of general circulation charges and insinuations against a brother officer by which his character for courage and honesty is aspersed and he is held up to odium and ridicule before the Army and the community was a highly unmilitary proceeding and one calling for a serious punishment upon a conviction under this article, and this whether or not the charges as published were true."[89]

In 1861, a court-martial found an enlisted man guilty of a violation of Article 62 for "writing and publishing in a newspaper, statements grossly defaming and misrepresenting the military service."[90]

In 1885, an officer was convicted under Article 62 involving "publications in newspapers, pamphlets, etc., of strictures upon the acts or conduct, official or personal of other officers."[91] And, in 1886, it was reported that a public criticism in a newspaper by an officer of a case which had been investigated by a court-martial and was awaiting the action of the president of the court was a violation of Article 62.[92]

Outspoken Army officers were not always punished. When he was Commanding General of the Army, Nelson Miles had challenged the McKinley Administration, among others, over the treatment of the troops in the Spanish American War. It is reported that McKinley considered removing Miles from command, but in the end, refrained from doing so.[93]

The Annual Reports of the Navy Department beginning in 1909 clearly indicate that restrictions on freedom of speech were every bit as stringent as was the case in the Army. Unfortunately, only the results of general courts-martial are included in the reports. The report for 1909 shows one officer convicted for "abusive language to another in the service." Also, there were undoubtedly some speech violations among the 60 officers and men (navy and marines) convicted of conduct to the prejudice of good order and discipline.[94] It is interesting to note that the Secretary makes only two references to specific crimes, desertion and fraudulent enlistment.[95] This would seem to indicate that the restrictions on speech were not proving much of an enforcement problem. The low number of general court-martial cases indicates the same thing.[96]

The Freedoms of Petition and Assembly

It will be recalled from the discussion dealing with the period of

the War Between the States, that the Articles of War dealing with petition and assembly were, in the order stated, Articles 34, 35, 32, 7, and 8. Under the 1878 revision, Article 34 became Article 29, Article 35 became Article 30, Article 32 became Article 54, Article 7 became Article 22 and Article 8 became Article 23. Aside from minor changes of wording, the only change is in Article 30 of the 1878 Articles. It is limited to enlisted men, whereas Article 35 of the 1806 Articles had applied to officers as well.[97]

Petition

In spite of the fact that Articles 29 and 30 were described as, "of but slight significance" and "of comparatively slight value" respectively,[98] Article 30, at least, was the subject of a number of opinions by the Judge Advocates General of this period. These expressed in 1867, 1868, 1869, 1872 and 1909 were all of the opinion that Article 30 was,

> not inconsistent with Article 83, which prohibits regimental courts from trying commissioned officers. It does not contemplate or provide for a trial of an officer as an accused, but simply an investigation and adjustment of some matter in dispute--as, e.g. a question of accountability for public property, of right to pay, or to an allowance, or relief from a stoppage, etc. The regimental court does not really act as a court, but as a 'board', and the 'appeal' authorized is practically from one board to another. But though the regimental court has no power to find "guilty" or "not guilty" or to sentence, it should come to some definite opinion or conclusion--one sufficiently specific to allow of its being intelligently reviewed by the general court [martial] if desired'.[99]

Opinions handed down in 1890 and 1895 attempted to delineate the types of matter that could be righted by Article 30, and those other matters which were beyond the competence of the regimental court.

> When the matter is beyond the reach of the regimental commander, it is beyond the jurisdiction of the

> regimental court. If it involves a question of irregular details, excessive work or duty, wrongful stoppages of pay or the like, a regimental court under this article may be resorted to for the correction of the wrong. Otherwise, then the case is one of a wrong such as can only be righted by the punishment of the officer.[100]

A 1909 opinion clearly established the character of the rights of the soldier under Article 30. "The right to complain which is vested in enlisted men in the thirty-eighth [thirtieth?] article of war is a right conferred by statute, and its exercise cannot be prejudiced by requirements of regulations."[101]

The military was equally adamant concerning methods for obtaining redress of grievances that were detrimental to discipline. In an opinion handed down in 1871, the Judge Advocate General pointed out that for an officer to join with other "inferior officers" of a regiment in writing a letter to the colonel in command, asking him to resign, was a violation of Article 62, the general article.[102]

This incident places in perspective the remark found in Winthrop about the advisability of several soldiers having the same grievance being able to combine in a joint complaint.[103]

Cases involving unlawful forms of petition seem to have been rare during this period. However, one worth mention occurred in 1877-78. The case involving Lieutenant Edward F. Turner of the Tenth Cavalry has a certain modern ring about it. Turner, the son of an admiral, in letters to newspaper editors and prominent governmental officials, accused Lieutenant Colonel William R. Shafter of, among other things, authorizing and commanding an illegal raid into Mexican territory, offering a bounty for dead Indians, sexual immorality and nepotism. These letters resulted in Turner's conviction on charges of conduct prejudicial to good order and military discipline. He was sentenced to be dismissed from the service.[104]

Assembly

In so far as unlawful assembly is concerned, there is no evidence that it posed a problem to the Army. In the Annual Report of the Secretary of War for fiscal 1912, the Judge Advocate General, in his listing of offenses tried by all courts-martial, lists not one single violation of Articles 22 or 23 of the Articles of War. Nor, are any clearly recognizable cases involving assembly listed under Article 62, the general articles.[105] The same is true of the report for fiscal 1914.[106] In the fiscal year 1916 report, there is only one case each of violations of Article 22 and 23 and none clearly recognizable under Article 62.[107]

The same may be said in the case of the Navy. In the years between 1909 and 1916, only in 1911 were sailors charged with failure to report mutiny and then only four. Surprisingly, no one was charged with actual mutiny. There were no recognizable cases under Article 22 of the Articles for the Government of the Navy, the general article.[108]

Based on the foregoing information, it is probably safe to assume that during this period some efforts were made to provide those in the Army with an official grievance mechanism. The Navy probably accomplished the same ends through more informal means. When military personnel chose to go outside these grievance procedures, they found themselves limited by the Articles of War or the Articles for the Government of the Navy. These limitations on assembly and attempts at having grievances redressed appear to have been completely justified as necessary for the maintenance of discipline. For example, if word of the letter writing activities of Lieutenant Turner had been circulated through Lieutenant Colonel Shafter's command, the latter would, in all likelihood, have been greatly hampered in his exercise of command. The same may be said for

the colonel whose officers presented him with a letter asking for his resignation.

The Freedom of Religion

Finally, we turn to the matter of freedom of religion. Article 2 of the 1806 Articles of War was remembered Article 52 in the 1874 Articles. Minor changes in wording were made. They were not significant.[109] There was no change in the Articles for the Government of the Navy.

Worship

The issue of compulsory attendance at religious services remained much the same as before, with no official policy requiring attendance. For example, in a 1907 opinion, the Judge Advocate General of the Army stated that the 52nd Article of War does not authorize a post commander to march soldiers to church or require them to participate in worship services as a part of a military formation.[110] This is not to say that official circles were not interested in religion among those in the land and naval services. Secretary of the Navy Josephus Daniels in his report of 1913 went into great detail over his desire for and the benefits to be derived from chaplains and other means of religious instruction.

> It is a reproach to our country that we have only the same number of chaplains in the Navy in 1913 as there were in 1842. Then with 24 chaplains there were 1,514 officers and 12,000 enlisted men. Now the number of officers and enlisted men has grown to 3,600 officers and 61,000 men. Only the number of chaplains has remained stationary. Our ships have changed from small wooden sailing craft to mighty armored dreadnaughts. The old sailor of ante-bellum days, if he could come back, would see all things made new, trebled and quadrupled, but he would find we had neglected to maintain growth in religious direction. There is need of an immediate increase in the number of men who are charged with the high duty of leading men afloat to a recognition of the truth that

man's first and highest obligation is to his Maker. I earnestly recommend an immediate recognition of the need of more leaders in the higher life on board our ships. I recommend additional chaplains and an appropriation to enable the Secretary to employ on every ship that has no chaplain a young religious leader known as a welfare secretary. It has been urged by wise and patriotic leaders that there should be a chaplain for every 1,000 men in the service . . . The chaplains should have the guidance of the work of all men charged with uplift work, but I believe that, in addition, there is need for adopting modern and approved methods of reaching and influencing the young men who have left their homes to man American ships. The chief problem with the church leaders, on land as well as on sea, is how to reach the young men. It is even a greater problem afloat than ashore, for the young men who enlist in the Navy are suddenly removed from the refining and restraining influences of the home. If there is any duty which the Government owes more than another to these youths who answer its call, it is to surround them with helpful influences. Navy officers realize the needs of the youths, and seek to aid them in right directions, but find that they are not better fitted to lead them in religious work than are employers of many young people in the civil walks of life. They feel the need for a vitalizing religious influence aboard ship.[111]

The next year Daniels was able to report that,

> The second session of the Sixty-third Congress signalized its interest in the spiritual welfare of the men of the Navy by authorizing the first increase in the corps of chaplains obtained since 1846, when the Navy was but half its present size. Last spring, when there was a possibility that men from our battleships would see active service, there was not sufficient number of chaplains with the fleet though every available one was ordered to duty. The increase allowed by last year's bill will enable the department in the future to assign a chaplain to every battleship. The new chaplains, in accordance with a provision of the law, will be appointed temporarily for three years, after which time they may be formally commissioned by the department.[112]

The Army also sought to improve the religious life of its troops. Soon after the close of the War Between the States, arrangements were made whereby the President could appoint thirty chaplains to serve at the various army posts and one chaplain each for the four regiments of Negro troops.[113] One wonders why the Negro troops were singled out.

It will be recalled that we have previously discussed the plight of the serviceman who wished to participate in his religion in an organized way, but could not because he was aboard ship, or in an isolated post and either there was no chaplain available or, the chaplain was a poor one or of another faith. Things did not improve a great deal during this period. In 1890, The Army and Navy Journal published a letter dealing with this problem.

> Two-thirds of the Army are Roman Catholics, and would attend the Services of that Church if the opportunity was afforded them. But all the chaplains (with one exception) are Protestants, and while they complain that the men don't attend services, they never take into account that the men desire the services of their own Church.[114]

At this same time, Senator F. H. Plumb of Kansas complained about religion in the Army. This was answered by Major General John M. Schofield, the commanding general. "Give the Army religious liberty and assist the man to obtain the religious ministrations of which they feel the need, and there will be the same interest in religion in the Army as elsewhere."[115] This provoked favorable responses from both Catholic and Jewish sources. In endorsing General Schofield's appeal, the New York Freeman's Journal suggested, "Let Uncle Sam be just to his Catholic soldiers; no one asks him to be generous; let there be religious liberty."[116] The Rabbi of the Hebrew American Congregation of Toledo, Ohio, Edward E. Browne, was of the opinion that Jews were reluctant to enlist in the Army because of the lack of Jewish chaplains. He urged that the Army appoint chaplains from the Catholic and Jewish faiths as well as the Protestant.[117] It will be recalled that the Navy suffered from similar problems.[118]

Both services, toward the end of this period, began to work toward

improving the quality of their chaplains. In this, they were assisted by the organized religious faiths.[119]

Compulsory medical treatment

It is during this period that the first positive limits on the free exercise of religion appear which do not involve compulsory attendance at a religious service. The Annual Report of the Secretary of War for 1912 lists thirty soldiers who were tried under Article 62 for "refusing to submit to surgical operation or medical treatment."[120] There were 29 such cases listed in the 1914 report,[121] and 61 such cases in the 1916 report, together with 1,094 cases of failure to report for prophylatic treatment.[122]

That these cases, or at least many of them, resulted from religious scruples against such treatment, is indicated by a 1911 opinion of the Judge Advocate General of the Army. There, where a soldier had refused a prophylactic treatment for preventing typhoid fever because of religious beliefs, the Judge Advocate General stated that since, "cases of this character are peculiar in that they affect the person of the soldier and are somewhat out of the line of regular military service in which unquestioning obedience is essential . . . the infliction of punishment in such cases would be regarded differently than if it were inflicted for a violation of orders directly pertaining to military service." It was suggested that the soldier be allowed to purchase his discharge rather than submit to the prophylatic treatment.[123]

It is not unlikely that the Navy experienced much the same sort of problem, although no specific records are shown in the annual reports. These reports, however, include only general courts-martial and do not

further define these cases listed as "failure to obey a lawful order."

While on the face of it, it might appear that these cases represent undue restrictions on religious liberty, a little reflection will indicate that here is an instance where freedom of religion cannot be absolute. The good of the service requires healthy personnel. In the close quarters of service life, the good health of one is often imperative to the good health of all.

CHAPTER XII

THE WORLD WARS

World War I 1917 and 1918[1]

The Articles of War were totally revised toward the end of 1916, but with the exception of a few Articles that took effect at once, the 1916 Articles became operative on March 1, 1917.[2] The 1916 revisions were important, and have been described as eliminating "obsolete matter" and introducing "many modifications and changes looking to a scientific and modern statement of military law."[3]

The Freedoms of Speech and Press

Earlier, eight of the Articles of War had been identified as in some way pertaining to speech and press. These had been traced virtually intact through the Articles of War of 1806 and 1874. Two changes occurred in the 1916 Articles. Article 53 which had prohibited any "profane oath or execration" was not made a part of the 1916 Articles.[4] There was added to the 1916 Articles a provision which forbade insubordinate conduct toward noncommissioned officers.

> Article 65.
>
> Any soldier who strikes or assaults, or who attempts or threatens to strike or assault, or willfully disobeys the lawful order of a noncommissioned officer while in the execution of his office or uses threatening or insulting language, or behaves in an insubordinate or disrespectful manner toward a noncommissioned officer while in the execution of his office, shall be punished as a court martial may direct.[5]

It will be recalled that this sort of offense had previously been handled under the general article.[6]

The remaining seven articles of importance to the freedoms of speech and press were changed only in minor regard. Article 62 which dealt with disrespect to the President and other governmental agencies and officials was changed by adding to the list the governor or legislature of any Territory or other possession of the United States in which the soldier might be quartered.[7] This, no doubt, reflected the territorial acquisitions made by the United States during the Spanish American War.

Article 63, disrespect toward superior officers, made a small change in wording that was probably of fairly great effect. The previous Articles dealing with this subject had spoken in terms of disrespect toward one's commanding officer, a substantial limitation in scope. Article 63 of the 1916 Articles of War broadened the prohibition to "superior officers."[8] Previously, disrespect toward superior officers who were not the accused's commanding officer had been charged under the general article.[9]

The remaining five, Article 66 (mutiny or sedition), Article 59 (advising another to desert), Article 90 (provoking speeches), Article 95 (conduct unbecoming an officer and gentleman), and Article 96 (the general article) remained the same except for an occasional unimportant wording change.[10]

The Articles for the Government of the Navy, discussed earlier, did not change during this period.[11]

It has been reported that the discipline in the Army during World War I was surprisingly good, at least among the troops of the American

Expeditionary Forces. The final report of the Judge Advocate of the A.E.F. indicated that, "The small percentage of trials by general courts-martial in the A.E.F. as compared with the Regular Army before the war is so remarkable as to require comment."[12] While in part explained by the "liberal employment of the special court-martial . . . by far the most important cause . . . was the character of the troops."[13]

In his memoirs, General Pershing, while commenting that, "The vast majority of both officers and men were unaccustomed to the restraints necessarily imposed, and unfamiliar with the rules and regulations required to insure good conduct and attention to duty," nevertheless, found that there was generally present, "a distinctly patriotic attitude of mind which made for self-discipline."[14] As for those who did not measure up, Pershing had the following to say,

> Yet, even after considerable military training, men were found in every command who, because of faulty bringing up or waywardness, could not be taught to realize the moral obligations of loyalty and obedience to constituted authority. It was from this class that usually came the offenders, relatively small in number, who gave the most trouble.[15]

The report of the Judge Advocate General in the War Department Annual Reports of fiscal 1917, 1918, and 1919 appear to bear out the idea that infractions of those provisions of the Articles of War that limited freedom of speech and press were rare, considering the number of personnel in the Army.[16]

A factor which no doubt mitigated the rigors of disciplinary restrictions on freedom of speech is reflected in the attitude of General Pershing. When "locomotive engineers and master bakers from America" were sent back to headquarters charged with insubordination for refusing to "change a skill that needed a lifetime to learn" merely in order to do

it the Army way, "It became a stock phrase in Pershing's office, that, 'You tell that narrow-minded Regular for me to leave you alone.'"[17] In the same spirit, what is probably an apocryphal story is told.

> An experienced major called a lieutenant to him as a weary platoon began its ten-mile hike to supper. "Why do you stick with your men, Lieutenant? Keep two hundred yards back of them and let 'em call you the bastard I hope you've been to 'em today. Let 'em blow off steam. Then, when they are rated the best platoon in their company, they'll be affectionate when they start consabitching you. I can't make you into a brave leader, but I can teach you the art of command."[18]

The instances of personnel in the Navy during this period being convicted by court-martial for violations of these Articles for the Government of the Navy that limited freedom of speech and press were few, as is indicated by the Reports of the Secretary of the Navy for fiscal years 1917, 1918 and 1919. The figures, however, reflect general courts-martial only.[19]

What can be said for that which, by every indication, is an actual improvement in these aspects of discipline pertaining to limitations on speech and press? There were relatively few persons charged with infractions of the rules limiting speech and none at all dealing with freedom of the press. One can only speculate that it was indeed the character of the men and also, perhaps, the fact that this war was almost certainly entered into in a great spirit of crusade. Thus, for many, it was almost a holy cause, to end war and make the world safe for democracy.

The Freedoms of Petition and Assembly

Turning now to the matters of petition and assembly, it will be recalled that as to the former, Articles 29, 30 and 54 of the 1874 Articles of War applied. Articles 29 and 30 were, in the 1916 Articles of War,

combined in Article 121. The regimental court-martial was done away with.

> Article 121.
> Any officer or soldier who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to the general commanding in the locality where the officer against whom the complaint is made is stationed. The general shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department of War a true statement of such complaint, with the proceedings had thereon.[20]

The pertinent portions of Article 94 were covered by Article 89 of the 1916 Articles of War.

> Article 89.
> All persons subject to military law are to behave themselves orderly in quarters, garrison, camp and on the march . . . Any commanding officer who, upon complaint made to him, refuses or omits to see reparation made to the party injured by anyone subject to military law insofar as the offender's pay shall go toward such reparation, as provided by Article 105, shall be dismissed from the service, or otherwise punished as a court-martial may direct.[21]

It is interesting to note that these grievance provisions were retained in the greatly revised Articles of 1916 in spite of Winthrop's view that they had been almost useless for a number of years.[22]

Articles 22 and 23 of the 1874 Articles of War dealt with the military prohibition of certain types of assembly. These became Articles 66 and 67 of the Articles of War of 1916. Except for minor wording changes (which do not affect the meaning) these articles remained the same.

Of course, the Articles for the Government of the Navy did not change during this period.

The impression of a well-disciplined military mentioned earlier is reinforced by a glance at the previously considered reports for fiscal 1917, 1918 and 1919. In the case of the Army, there were only 237 convictions for any offense pertaining to Articles 66 and 67.[23] The situation is even

more startling in the Navy where not a single case under the mutiny articles are reported for fiscal 1917, 1918 and 1919.[24]

Before considering freedom of religion, it would be well to comment further on the altogether rather remarkable situation that existed during the war years. The by now well-established limits on the freedoms of speech, press, petition and assembly were very much a part of the Articles of War and the Articles for the Government of the Navy. And, they were apparently being enforced. The land and naval forces (although principally the former) were filled with citizen soldiers and sailors, whose acquiescence in large restrictions on their freedoms of speech, press, assembly and petition, was little short of amazing.[25]

The Freedom of Religion

In the matter of religion, only the Navy retained the recommendation about attendance at divine worship. The Army recommendation was deleted in 1916 revision of the Articles of War.[26] The Navy, of course, retained the earlier provision. Even with this difference, it is doubtful if practice varied much between Army and Navy except in the case of zealous ship's captains who could still use the recommendation to provide a shred of justification for compulsory attendance.

It was during the relatively short span of World War I that the first truly meaningful moves were made in the direction of a truly "free exercise" of religion for the soldier. In the National Defense Act of 1916 (actually some ten months before the declaration of war), the first glimmerings are seen. It provided for (or at least authorized) the appointment of one chaplain for each regiment of the following branches, Cavalry, Infantry, Field Artillery and Engineers and one chaplain for

each 1,200 officers and men of the Coast Artillery.[27] By June 30, 1918, there were 144 chaplains serving with the Regular Army.[28] The situation was further improved by the Act of Congress of May 25, 1918, which authorized the appointment of a chaplain for each 1,200 officers and men "in all branches of the military establishment."[29] These moves helped to provide chaplains for Roman Catholic soldiers and those of the larger Protestant denominations. The Roman Catholic chaplain quota was, during the War, raised from 24 to 37.8 per cent.[30] At the declaration of war, there were only twenty-five Roman Catholic Chaplains but by the Armistice there were 1,023.[31] With so large a number of chaplains, a separate Bishop was appointed for them and their flocks.[32]

Of perhaps even greater importance was the Act of Congress of October 6, 1917. It will be recalled that Jews and members of the smaller Protestant sects had always suffered from a lack of chaplains of their own. This was partially remedied by this act, because it authorized the appointment of "not exceeding twenty" chaplains, at large, for service during the war, who were to represent religious sects not recognized in the regular appointment of chaplains. It covered the following: Hebrews, Christian Scientists, Latter Day Saints, Salvation Army and Greek and Russian Catholics.[33] By June 30, 1918, ten of these chaplains had been appointed, although it was discovered that inasmuch as priests of the Greek and Russian Catholic Churches could not become United States citizens, they could not be appointed as chaplains.[34]

By the Armistice, there were 2,230 chaplains on duty with the Army.[35] Even this number was not enough. In his final report, General Pershing pays tribute to the Welfare Societies who met the need by sending ministers and Priests "where most needed."[36] Tribute was also paid to the

Y.M.C.A., the Knights of Columbus and the Red Cross for taking up some of the slack.[37]

The story of the chaplains in the Navy is much the same. When war was declared in April, 1917, there were forty chaplains on duty. By the Armistice, there were 203 chaplains, although only 201 were actually on duty at any one time.[38] If the ratio of one chaplain for each 1,250 naval personnel had been achieved, the number of chaplains would have been 480.[39] As in the Army, an effort was made to fulfill the spiritual needs of those of faiths other than Roman Catholicism and the larger Protestant denominations. Consequently, there was one chaplain of the Christian Science faith, one Jewish chaplain, one Moravian chaplain, three chaplains of the Reformed Church, one United Brethren chaplain and three Universalist chaplains.[40]

While commissioning chaplains of the smaller religious groups was helpful, it could not, of course, solve a problem that is without a complete solution. There is no way to provide a chaplain of each man's faith on each small military installation, much less aboard every ship. Roman Catholics and those Protestants whose faith followed general Protestant tenants were usually able to have access to an appropriate chaplain. After all, a Methodist usually would not object to a Baptist chaplain conducting a nondenominational Protestant service. The soldiers and sailors of Jewish faith were slighted while the relatively tiny Protestant groups were victims of their size. They were beyond the reasonable limits of what the military could generally be expected to provide in the way of a chaplain, other than one who would be available once in a while as he, perhaps, rode circuit. Of course, many, if not most, chaplains would try to be of spiritual guidance to those of other faiths, but such an arrangement leaves much to be desired.

Between Wars 1919 to 1941

The Freedom of Speech and Press

The 1916 Articles of War had only been in operation for a few years when they were revised by the Articles of War of 1920. With the exception of three Articles (none of which concern this inquiry), the 1920 Articles became operative on February 4, 1921.[41] The following of the 1920 Articles pertaining to speech and press retained the same number and wording as in the 1916 Articles: Article 58,[42] Article 62,[43] Article 63,[44] Article 66,[45] Article 90,[46] Article 95,[47] and Article 96.[48] Article 65 was changed in the 1920 Articles by adding warrant officers to noncommissioned officers as persons protected.[49] These eight articles remained in effect unchanged until 1950.[50] The pertinent parts of the Articles for the Government of the Navy continued unchanged, also until 1950.[51]

Policy disagreements with superiors

The cause celebre of the freedom of speech and press in the Army during this period of time was the trial of Colonel Billy Mitchell of the Army Air Corps. Mitchell, frustrated, among other things, by what he considered to be neglect of military aviation in both the Army and Navy, had been outspoken in his campaign for air power.[52] This had led to the decision that he not be reappointed Assistant Chief of the Air Service in 1925.[53]

Instrumental in this decision made by President Coolidge were Secretary of War John W. Weeks and Secretary of the Navy Dwight Wilbur, both of whom had been criticized by Mitchell.[54] Coolidge probably didn't need much prodding. It is reported that the President said to Weeks,

> Mitchell will have to keep his mouth shut from now on or he will be penalized until he learns his lessons. He has talked more in the past three months than I have since I was born.[55]

Two events early in September, 1925, resulted in Mitchell taking the course of action that led to the court-martial. The Navy had attempted to send three PN flying boats from California to Hawaii, a flight which had never before been accomplished. Mitchell felt that both the aircraft and flight planning were inadequate. One plane was not able to take off, one was forced down almost at once, and the third vanished almost to its goal after radioing that it was running out of gasoline. The crew were eventually rescued after being afloat in the downed aircraft for nine days.[56]

The other incident was the wreck of the Navy dirigible Shenandoah, commanded by Mitchell's friend, Commander Zachary Lansdowne. The ship had been ordered to tour the midwest in spite of Lansdowne's protests about the weather. The vessel was caught in a storm and destroyed. Lansdowne and several others were killed.[57]

Mitchell wasted little time in issuing his statement to the press. It exceeded 6,000 words in length. In it, he charged that the two September disasters (the flying boat crew had not then been rescued) were "the result of the incompetency, the criminal negligence, and the almost treasonable negligence of our national defense by the Navy and War Departments."[58]

The reaction from press and public, although for the most part favorable, reflected differing opinions on the extent of freedom of speech and press which should be enjoyed by a member of the armed forces. The New York World editorialized: "Permit this violent outburst to go unpunished and every private in the Army and enlisted man in the Navy will

feel at liberty to denounce his superior officers. Armies and navies are not made that way."[59]

An open letter to Mitchell was written to the Houston Chronicle by the brother of the navigator of the Shenandoah. "You have no place in the service of your country when you have so little respect for its authority."[60]

The majority of public opinion was represented by the Los Angeles Record and Boston's mayor, James Curley. The Record, in an editorial, took the Government to task.

> And what did President Coolidge say when he heard of the disaster? 'It is God's will.' God's will! Pious fiddlesticks. Sanctimonious drivel. We suggest rather than a court-martial, we might try our distinguished fellow townsman, the Secretary of the Navy, for criminal stupidity.[61]

Curley, speaking before an American Legion convention, stated of Mitchell,

> There is one man not lacking in courage. While other nations are gaining supremacy of the air with the finest planes and decent appropriations, we are sending the bravest and best of our sons in rotten planes into the air.[62]

In another statement to the press issued on September 9, 1925, Mitchell renewed the attack: "What I have said about the conditions in our national defense hurts the bureaucrats in Washington. It ought to hurt them because it's the truth."[63]

Mitchell was charged with violation of Article 96, the general article which prescribed "all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes and offenses not capital."

The court-martial opened on October 28, 1925. After challenging Generals Summerall and Sladen off the court, chief defense counsel Frank

Mr. Reid's first move was to seek that the case be dismissed on the basis of Mitchell's First Amendment freedoms. He asked, "Are soldiers people as defined in the Constitution?"[64] Surprisingly enough, Reid was able to cite as authority, President Coolidge. In a recent address at the Naval Academy, the President had stated that Naval officers were free to state their views.[65]

The Army's chief trial counsel, or prosecutor, countered with the argument that, while every soldier had certain rights, he must nevertheless "conform to 'those things which military tradition, or military law . . . lay down upon him.'" He argued that "when a man enlisted, he lost civilian status and gave up personal liberties. 'If not, the Army of the United States would be left to rot on government soil.'"[66]

This was the argument that won the day. The first truly great direct confrontation between First Amendment freedoms and the military's requirements for limitations on these rights was over even though the court-martial had barely begun. The court did, however, later concede that if Mitchell "could prove that he had a proper basis for his charges, . . . he would be exonerated."[67]

Such was not to be the case. Mitchell was convicted and sentenced to suspension from rank, command and duty for five years with forfeiture of all pay and allowances for the same period of time.[68] He resigned from the Army soon thereafter. He did not live to see his views vindicated in World War II.

Douglas MacArthur was a member of the court-martial and claims to have done what he could to assist Mitchell, including helping to save him from dismissal from the Army, a severe punishment. His views on the freedom of speech that should be accorded in the case of high ranking officers in the military are as follows:

> It is part of my military philosophy that a senior officer should not be silenced for being at variance with his superiors in rank and with accepted doctrine. I have always felt that the country's interest was paramount, and that when a ranking officer, out of purely patriotic motives, risked his own personal future in such opposition, he should not be summarily suppressed. Superior authority can, of course, do so if it wished, but the one thing in this world that cannot be stopped is a sound idea. The individual may be martyred, but his thoughts live on.[69]

One cannot help but wonder if MacArthur did not also have himself in mind when he wrote this opinion. In any event, he did admit that Mitchell "was wrong in the violence of his language."[70]

There is evidence that MacArthur had earlier held different views about the propriety, if not the legality, of an officer on active duty publicly opposing the civilian chiefs of the military services. While he was Chief of Staff of the Army, in 1933, he asked for, and received, an appointment with President Roosevelt to caution against what he, MacArthur, felt were dangerous efforts to trim the budget at the expense of the Army. After the argument became heated and with the President remaining adamant in his position on the sacrifices that would have to be made by the Army in the interest of a balanced budget, it is reported that MacArthur told Roosevelt that he had no other choice but to oppose him publicly. "I shall ask for my immediate relief as Chief of Staff and for retirement from the Army, and I shall take this fight straight to the people."[71] Roosevelt apparently modified his policy sufficiently so that MacArthur did not have to carry out his threat.[72]

That the Navy took the same position as the Army in regard to criticism of orders and naval policy is shown in the case of Lieutenant George Marvell which occurred in 1924. Marvell had been ordered to take temporary command of submarine O-4 and sail the vessel to Hampton Roads

to participate in a Presidential review. The charge against him alleged that without personally ascertaining the facts, he wrote a letter of protest to the officer in charge of the submarine base at New London, Connecticut, to protest his assignment. The protest was based on the arguments that the submarine was unfit for sea, that he was unfamiliar with the officers and crew of the O-4, and was not familiar with their efficiency, that he was separated from his regular command, and that his assignment to the submarine and her trip to Hampton Roads were unnecessary.

The crux of the Navy's case was that Marval had presumed to pass judgment on things that were not up to him to decide and that he had criticised the judgment of his superiors. He was found guilty by general court-martial and sentenced to lose twenty-five numbers in grade. This was fairly severe punishment in the peacetime Navy where advancement was slow.

The importance attached to this case by the Navy is indicated by the comment placed in the record of trial by the Chief of the Bureau of Navigation.

> The Bureau has noted several other protests submitted by officers, which while covering matters of a much less important nature, nevertheless clearly indicate that, to some at least, the right to unhesitatingly judge and question orders issued, exists; the Bureau therefore recommends that such part of the proceedings of the general court martial as will clearly point out the mistaken ideas be published for the information of the service.[73]

Disrespect for governmental institutions

The Navy also experienced during this period some difficulty in adequately charging offenses dealing with speech and press because of apparent inadequacies in the pertinent parts of the Articles for the Government of

the Navy. A most important case occurred in 1921 when an officer was charged with disrespect to the President and the Secretary of the Navy. There was no specific provision for these offenses comparable to Articles of War 62. The court-martial held that the offenses could not be predicated upon the Navy general article, Article 22, because of its wording which reads "All offenses committed" and nowhere is disrespect for the President or the Secretary of the Navy made a crime. It was decided that the charge would have to be based on Article 8 Section 6 of the Articles for the Government of the Navy and would have to allege that the accused was disrespectful to the President or the Secretary of the Navy while in their presence and while that person was in the execution of his office. Or, the charges could be based on disobedience of a Navy Regulation which forbade language which "might tend to diminish the confidence in or respect due to a superior in command."[74] In neither case would the charge be as easy to prove as one under Article of War 62.

Disrespect for military superiors

These cases contributed to an expanding body of law concerning the freedom of speech in military society. In 1921, it was held that the fact that at the time the accused used disrespectful language to an officer, he was refusing to obey an illegal order given him by that officer was no defense to a charge of violating Article of War 63.[75]

The relationship between Article 63 and Article 96 in the matter of insulting language toward a noncommissioned officer was at issue in a 1922 general court-martial in which it was held that if the noncommissioned officer was not engaged in the execution of his office at the time of the insulting words, the offense was against Article 96 rather than Article 63.[76]

In 1923, a general court-martial ruled that in order for there to be a violation of Article 65, there must be evidence before the court that the noncommissioned officer or warrant officer was present when the language complained of (in this case, threatening language) was used.[77]

The association between insubordination and closely related offenses not directly relating to speech was discussed in two cases during this period. In 1919, a general court-martial decided that where the accused, while holding an open razor, had told a sergeant not to touch him or he would cut the sergeant's throat, the crime was insubordination and not assault since there was no threat of violence unless the sergeant took some action.[78] In 1941, it was decided by a general court-martial that a charge of disrespect under Article of War 63 would not support a finding of guilty of either assault or willful disobedience which are distinct offenses and must, consequently, be charged under Article of War 64.[79]

Two cases illustrate the fact that words which are innocent in and of themselves may be made the subject of charges based on the circumstances surrounding their utterance. Both cases occurred in 1931. The first involved the words "what difference does it make, its got a wrapper on it," uttered in response to a question from a chief gunner's mate as to why the accused was kicking bread about on the deck. The charge failed to allege that the words were spoken in a disrespectful manner. Therefore, the conviction was set aside.[80] In the second case, words used by an enlisted man to his superior officer were held, in themselves, not to be disrespectful or contemptuous and, since the charge did not make allegations concerning their manner of delivery, it was fatally defective.[81]

A court-martial in 1921 also defined the word "profane" as used in

the First section of the Eighth Article for the Government of the Navy as "Exercising or manifesting irreverence, disrespect, or undue familiarity toward the Deity or religious things; blasphemous; sacrilegious; irreligious; impious."[82]

In the matter of the types of offenses against these Articles of War and Articles for the Government of the Navy that restrict the freedoms of speech and press, the fiscal years 1926 and 1932 have been selected as being representative of the period between the World Wars. They reflect a low number of speech offenses.[83] The reader who wishes to see the statistics for the entire period is referred to the Annual Reports of the Secretary of War and those of the Navy Department for the remaining years.

The Freedoms of Petition and Assembly

The 1920 Articles of War retained, intact, the two Articles dealing with petition for redress of grievances, Articles 105 and 121 and the one Article dealing with assembly, Article 66.[84] These Articles remained unchanged throughout this period and except for slight procedure changes in Article 121, which occurred in 1948, all three remained unchanged until 1950.[85]

The Articles for the Government of the Navy pertaining to assembly remained the same during this period and indeed, up to 1950.[86]

The exclusive character of redress of grievances provided for in Article of War 121 is illustrated by a 1941 case in the state courts of Oregon. There it was held that Article 121, as it applied to National Guard personnel in federal service, prescribes the measure and mode of redress to which an officer is entitled for a wrong done him by his commanding officer. Thus, maintenance of action for malicious prosecution by an officer against his superiors who instigated and prosecuted a gen-

eral court-martial against the officer was precluded.[87]

The previously considered annual reports of the War and Navy Departments list not a single conviction for violating the pertinent parts of the Articles of War or Articles for The Government of the Navy.[88]

Freedom of Religion

Free exercise

The 1920 Articles of War followed the practice of the 1916 Articles and made no reference to attendance at religious services.[89] This continued through the period presently under study.[90] The Navy, on the other hand, retained its recommendation concerning attendance at worship service.[91]

There is no evidence of any pattern of Army commanding officers trying to enforce attendance at religious services. However, in an effort to stimulate attendance, contests were established on some posts and a trophy given to the unit having the best attendance during the month.[92] It is not inconceivable that such contests could have stimulated unit commanders or sergeants to apply pressure on their men in order to win the trophy. While there is no indication of any Navy policy to covertly require attendance, it is likely that ship's captains, if they so desired, could place pressure on the crew to attend the worship service still required aboard ship.

The chief problem in both services continued to be that there were never enough chaplains. Shortly after the armistice of World War I, the number of Army chaplains was reduced to the minimum needed to fill the number of Regular Army slots, 125.[93] By 1931, the number had dropped to 120.[94] This number was based on one chaplain per 1,152 Army personnel

and created a situation in which many of the smaller installations simply could not be supplied with chaplains.[95]

In most cases, however, the slack here could be taken up by allowing the troops to attend church in nearby communities or, perhaps, in some cases, bringing in ministers, priests or rabbis from the community to hold services on post. For most army personnel, this access to civilian religious instruction would make up for the lack of chaplains. It could even usually alleviate the problems of those members of sects that were not represented in the Chaplains Corps or were just nominally represented.

The situation was worse in the Navy, principally because ship's crews did not usually have access to civilian ministers to take up the slack. It is reported that never during the period 1920-1939 did the actual number of chaplains meet the authorized ratio of one chaplain to each 1,250 naval personnel.[96] Then, there was the problem of the members of the small sects. Their representation in the Naval Chaplains Corps was, at best, only token. Take, for example, the two years previously selected as illustrative of this period. In fiscal 1926, while there were a total of seventy-four chaplains representing the major Protestant denominations and the Roman Catholic church, there were only twelve representing the smaller sects and only a few of them at that. There was not one Jewish chaplain.[97] In fiscal 1932, the situation was virtually unchanged. A total of sixty-eight chaplains of the major Protestant denominations and Roman Catholics were on the rolls against a total of sixteen representing a few of the smaller sects. Again, most of the smaller sects and the Jewish faith were not represented at all.[98]

There can be no doubt that, especially in the case of those in the Navy serving in ships at sea, many service personnel were denied access

to their faith's men of the cloth. However, in cases of those serving in ships at sea and on isolated stations, this was a limitation on free exercise of religion that could hardly be avoided. Only the access to civilian religious institutions and personnel prevented a much greater denial of this important freedom.

During this period, there occurred another crisis in the matter of religious freedom. This was the attack by groups, basically pacifist in nature, on the institution of the military chaplaincy. In effect, the position was that war was anti-religious and, therefore, the religious institutions should stop supporting the military establishment by providing it with chaplains.[99]

The establishment of religion

The anti-chaplain activities also took the form of claims that the institution was a violation of the "establishment" clause of the First Amendment. This was reminiscent of a movement with similar aims that had taken place in the 1840's. The defense of the institution of chaplains by the Judiciary Committee of the United State House of Representatives is apropos. The committee defended, among other things, on the basis that "man had the right to worship even in remote places."[100] The same committee later found that the chaplains were not "an establishment of religion."[101] In 1928, the federal courts held that a taxpayer or citizen may not sue to enjoin payment of funds appropriated for salaries of chaplains of Congress, Army or Navy on the ground that it constituted a promotion of religious views.[102] This is the whole point. Far from being a violation of the "establishment" clause, to deny chaplains to those in the service, especially those isolated from civilian society, would be a violation of the "free exercise" clause of the First Amendment.

World War II 1941 to 1945

The Freedoms of Speech and Press

The previously discussed provisions of the Articles of War pertaining to these two freedoms remained unchanged during the years of the United States' direct involvement in World War II [103]

Political commentary

If any individual in the Armed Forces during these years personified the problems inherent in applying the First Amendment freedom of speech to the military, it was George Smith Patton, Jr. It is probable that the things Patton did say or the ever-present threat of what he might say were a constant source of worry to his superiors. Two incidents involving Patton indicate the limits that were considered necessary to be placed on what an officer of Patton's rank and fame could say in public.

The first of these occurred on April 25, 1944, at an ad-lib talk he gave at the opening of a Welcome Club established by the people of the small English town where Third Army had its headquarters. That Patton was already smarting from things he had said and done is evident from the fact that he asked for, and received, assurances from those sponsoring the event that the talk would not be given any publicity and that he would not be quoted. Such was not to be.

In the talk, in speaking of the need for Anglo-American cooperation, Patton commented that "Since it is the evident destiny of the British and Americans to rule the world, the better we know each other, the better job we will do!" The fact that Patton had not included the Soviet Union along with the British and Americans created a terrible furor in the

Congress and the American press which nearly saw him relieved of command.[104]

In September, 1945, a similar incident finally resulted in Patton being severely disciplined. During his duties as head of an army of occupation, Patton had come to realize the necessity of using Germans to keep the wheels of everyday life turning, even if the Germans happened to be former Nazis. This created resentment in several quarters and inevitably led to him being questioned about it by the press. Patton, who was coming to sympathize with the Germans as his dislike of the Russians grew, defended his use of the Nazis. At a press conference, one of the reporters following up Patton's defense, asked him if "most of the ordinary Nazis joined their party in about the same way that Americans become Republicans or Democrats?" The trap was obvious, but not to Patton. "Yes, that's about it.' The headline read, "American General says Nazis Are Just Like Republicans and Democrats."[105] Four words had cost Patton the Third Army.

These were tiny indiscretions, if indeed there were indiscretions at all. Yet, they were to cause Patton much grief and finally the command of his beloved Third Army. Such were the practical limits on the freedom of speech imposed on a soldier in Patton's status. But it was not just famous commanders, but common soldiers as well, who found limits on their remarks, especially in time of war.

Disrespect for the Government and its institutions

In 1945, a soldier was charged with a violation of Article of War 96 for "making and uttering disloyal statements against the United States." This consisted of writing and mailing two letters containing disloyal

statements. On review, the conviction was affirmed because the act was considered to bring discredit on the military service.[106]

That more than just bringing discredit on the military service is involved, is evident in the case of an Infantry captain who was charged under Article of War 96 for telling some of the men in his company that the United States was fighting on the wrong side because Germany was a better democracy than we were. He also expressed the fear to them, that after the war was won, the United States would be a colony of England. He promised to resist such an eventuality. The captain was convicted and sentenced to dismissal.[107] The obvious concern here was discipline and the degree to which it could be undermined, not so much by the soldiers believing what the captain said, but rather that they would be less likely to pay him the respect and obedience due his rank and position, thereby effecting the performance of the company.

There must, however, be a real danger of statements such as these being harmful to the Army. This is borne out by the case of an enlisted man charged and convicted under Article of War 96 for "an attempt to cause insubordination, disloyalty, mutiny, or refusal to duty in the military forces of the United States by using certain disloyal language in the presence of other enlisted men." The conviction was overturned on review because, although the statements were favorable to the enemy and unfavorable to the Allied cause, the evidence was clear that: (1) the accused was intoxicated at the time, (2) no action was suggested, (3) no encouragement of disloyalty or insubordination resulted, and (4) the only effect was to arouse resentment against the accused.[108]

Finally, in regard to disloyal statements, it must be made clear that thoughts alone, no matter how disloyal, are not to be made the sub-

just of prosecution. Such was the ruling in the case of a G.I. who, before an officer carrying out an official investigation as to the propriety of the G.I.'s induction, and upon being asked, stated that in his opinion the United States was at fault in the war, that he had great love for Germany but not, apparently, the Nazi regime, that he had not understood his naturalization as an American citizen to entail bearing arms and, even at the cost of his citizenship, he would refuse to bear arms. Because of the foregoing, he was convicted of making disloyal statements in violation of Article of War 96. The conviction was overturned with the reviewer pointing to the circumstances in which the statements were made, and to the fact that had the accused lied under oath about his feelings, he would have been subject to prosecution. On the other hand, he would have been guilty of fraud if he had remained silent. Further, there was no subversive act and no attempt to influence others.[109] To have allowed the conviction to stand would have been to punish the G.I. for his thoughts.[110]

In 1945, the federal courts refused to interfere with a court-martial conviction of a soldier under Articles of War 62 and 96 for uttering disrespectful words toward the President and for defending Germany and Japan. He had been sentenced to a dishonorable discharge, forfeiture of all pay, and imprisonment at hard labor for 20 years.[111]

The experience of the Navy during World War II, with disloyal statements, also contributed to the growth of the law surrounding the freedoms of speech for those in military service. Sometimes these decisions were in seeming conflict with Army decisions.

In the matter of disloyal statements, a 1942 court-martial held that the seditious words forbidden by Article 5 Section 3 of the Articles for

the Government of the Navy "are those which tend to degrade and villify the Constitution, to promote insurrection and to circulate discontent, to asperse justice and anywise impair the exercise of the functions of government."[112] Furthermore, even admittedly seditious words must have been uttered knowingly and with seditious intent.[113] Therefore, any "idle expression of opinion without any intent to either villify the United States or to promote insurrection, therein, or in any way impair the exercise of governmental functions, should not be regarded as seditious."[114]

A 1944 court-martial apparently applied the reasoning from a civilian prosecution under the 1917 Espionage Act[115] to the activities of a sailor.

> The mere fact that disloyal and unpatriotic ideas are enumerated by a citizen is not enough of itself to warrant a finding of criminal intent, unless there is sufficient evidence to infer, beyond a reasonable doubt, that he intended to bring about the specific consequences prohibited. An American citizen has a right to discuss such matters either by temperate reasoning or by immoderate and vicious invective without being guilty of sedition.[116]

It is not clear how this holding can be completely squared with the apparently stricter Army rule in prosecutions for disloyal statements under Article of War 96. The only explanation would seem to be that the prohibitions under the general article were much broader than just seditious words. Thus, the latter writer could be prosecuted for bringing discredit on the military services. No examples were found of similar prosecutions under the Navy's general article, Article 22.

Disrespect to military superiors

A relatively minor incident could get a soldier in trouble under Article of War 63. In 1942, in response to an order by his company com-

manner to doubletime from the company kitchen to the company supply room, the accused invoked the name of the Deity in refusing to do so. This was sufficient for conviction.[117]

However, in order to be convicted, the accused must actually realize that the person to whom the remarks are addressed is his superior officer. In 1943, a second lieutenant was lodged in a civilian police station, charged with being disorderly. Two first lieutenants and a captain arrived to investigate and were addressed by the second lieutenant in disrespectful and obscene language. That he recognized the captain was clear since he called him by that title. There was nothing to indicate, beyond a reasonable doubt, that he recognized the other two as first lieutenants. Thus, only so much of the conviction as concerned disrespectful language toward the captain was allowed to stand.[118]

The rule in the Navy was perhaps even broader in that it was decided that intoxication "to the extent that the accused is deprived of reason and understanding constitutes a defense to a charge of 'Disrespectful in language and deportment to his superior officer.'"[119]

At least in the case of officers, even seemingly small verbal indescretions can become the basis for severe disciplinary action. In an almost unbelievable case (at least on the basis of the facts available), a second lieutenant was convicted of a violation of Article of War 95 and sentenced to dismissal from the Service for stating in the presence of three other officers that he would like to have sexual intercourse with the wife of another officer (not one of those present). The reviewer, in affirming the conviction and sentence, held that the remark "indicated unworthiness to be an officer."[120]

This study has, all along, treated the prohibition against exciting

or causing a mutiny (Article of War 66) a matter of speech while treating the taking part in or being present at a mutiny (also Article of War 66) an instance of assembly. That the two are, in fact, separate is affirmed by a 1944 case holding that the former may occur without the latter having taken place.[121]

Press

Freedom of the press became something of an issue due principally to the serviceman's newspaper, the Stars and Stripes and especially the paper's cartoonist, Bill Mauldin. The source of difficulty were the now almost legendary cartoon characters, Willie and Joe. Mauldin had considerable trouble because of their appearance, and their survival intact, or almost so, indicates that a fair amount of press freedom existed. Before discussing them in more detail, it is also interesting to note that Mauldin, before he came to work on the Stars and Stripes had found his old paper, the 45th Division News, to have almost complete freedom. As he described it, "We thought and wrote what we damned well pleased, just so we got a paper out."[122] Although he first had doubts about the Stars and Stripes, he soon came to realize that the paper enjoyed unprecedented freedom.[123] As Mauldin saw it, usually it was the rear echelon people who placed the limitations on the paper's freedom. Thus, for example, when the Stars and Stripes printed letters from soldiers who were upset over a particular situation (Mauldin doesn't describe what it was) and he drew some several cartoons on that subject, the deputy theater commander forbade the paper to further distribute some of Mauldin's work. Yet, at about the same time, a corps commander showed sympathy. "When you start drawing pictures that don't get a few complaints, then you'd better quit, because you won't be doing anybody any good."[124]

As might be expected, Mauldin, together with Willie and Joe, had a run-in with General Patton. Patton's principal opposition was the unshaven, unkempt appearance of Willie and Joe. In Third Army, "a necktie, conspicuous for its absence in [Mauldin's] cartoons, had a distinct place in the war effort and was regarded as second in importance only to a hamocks, maybe."[125] Patton discussed the problem with Colonel Egbert White, the publisher of the Stars and Stripes, and suggested that if Willie and Joe weren't drawn shaved, that the paper stop featuring them. White did not agree. Patton then carried the complaint all the way to Eisenhower who "dismissed the complaint with a hearty laugh and a spirited defense of Willie and Joe."[126] Eventually, Patton had to give up and "Willie and Joe were tolerated as the only two unkempt, unshaven degfaces in the Third Army."[127]

One definite limitation was on editorials. They had to be approved by the Army.[128] Another was military security.[129] Beyond that, everything was pretty much fair game, even if some of his cartoons about generals "had a definite insubordinate air about them."[130]

Mauldin gave an excellent summation of the freedom of the press issue:

> A soldier's newspaper should recognize two restrictions--military security and common sense. Outside of that, it should devote itself solely to being a paper that will provide the soldiers with good news coverage and a safety valve to blow off their feelings about things.
>
> . . . . . .
>
> It's an accepted fact that you must be totalitarian in an army. The guys know that but sometimes it chafes a little. That's why we do more bitching and groaning than any other army. And that's why it is a tremendous relief to get a little breath of democracy and freedom of speech into this atmosphere of corporals and generals and discipline and officers' latrines. Its a big relief even when it has to come from a little four page newspaper.[131]

The Freedoms of Petition and Assembly

As was the case with those provisions of the Articles of War dealing with freedom of speech and press, the provision pertaining to petition and assembly remained unchanged from 1941 to 1945.[132] The same was true for the Articles for the Government of the Navy as to assembly, their having no provisions in regard to petition.[133]

The law governing these limitations placed on assembly and petition received further definition by two cases decided in the Army, both in 1944. Each dealt with petition, and one with what was, in effect, an assembly regarding grievances, albeit an impromptu one.

That the expression of grievances and the search for their redress must be an individual one in the military was the subject of the court-martial of an officer under Article of War 96 for "wrongfully and unlawfully advising and encouraging the preparation and forwarding to the Inspector General of letters of criticism and protest by enlisted men with the purpose of discrediting the company commander with higher authority." The platoon leader, or perhaps the company executive officer, was aggrieved by actions of the company commander. Apparently, this feeling was widespread in the unit, for when the accused sought out an enlisted man with similar grievances and suggested that he get his buddies and other dissatisfied enlisted men to write to The Inspector General "censuring the company commander with the purpose of bringing about an investigation in the expectation that the company commander would be removed," over 100 nearly identical letters were sent to the I.G. The I.G. served the purpose, among others, of investigating soldier complaints. The officer was convicted and, on review, it was held that his actions "were clearly contrary to good order and military discipline."[134]

A case involving both assembly and petition resulted from an incident when a detail of soldiers, apparently claiming illness, refused to get aboard a truck when ordered to do so by the officer in charge of the detail. The officer ordered two corporals to force one of the men to get aboard and, at that, the senior noncommissioned officer told the officer that he was not supposed to use force on the malky soldier. At that moment, a colonel came along and had the sergeant arrested. The sergeant was accused of causing a mutiny in violation of Article of War 66 and was convicted, as charged, by a court-martial. The conviction was overturned, on review, because the events did not meet the definition of a mutiny. "Not only was the officer's authority not overridden, but there was no showing to support the inference necessary to sustain the conviction, that the accused, in combination with the recalcitrant soldiers, intended to override it." Surprisingly, an extremely limited form of assembly was sanctioned by implication (although no doubt caused by the assembly being impromptu) because the reviewer continued that, "At the most, the delay was occasioned by an asserted belief that the allegedly ailing soldiers had a right to attend sick call before entrucking." The sergeant was, however, convicted of disrespectful behavior.[135]

General Eisenhower, toward the end of World War II, was forced to set up a special staff to investigate soldiers' complaints. Eisenhower described the situation in a letter to General Marshall on October 31, 1944.

> I am going to find a very good colonel or brigadier general and give him a staff of two officers and three or four noncommissioned officers . . . I will give them a couple of small automobiles and start them on this job through the rear areas, including England. I have worried about this subject considerably but I did not know that the attitude of men returning from here reflected so much complaint and discontent. God knows we have tried, but it is obvious we must do something more.[136]

Compulsory attendance at worship

The Army, in its Articles of War, continued to make no mention of religious or divine service, while the Navy retained Article 2 in its Articles for the Government of the Navy.[137]

Religious conflict with military courtesy

Joe L. McCord had, subsequent to his voluntary enlistment in the Army, become an ordained minister in the Watch Tower Bible and Tract Society. His new-found religious convictions would not allow him to salute his superior officers or salute the flag of the United States. He sought release from the custody of the Army by petition for a writ of habeas corpus. The petition was denied by a United States District Judge and appeal taken to a United States Court of Appeals.

In affirming the judgment appealed from, the Court decided that the "regulations requiring a soldier to salute his superior officers and his flag are not intended to interfere with religious liberties, and the enforcement of the regulations by a proper military tribunal does not violate the Constitution of the United States."[138]

Access to chaplains

The major religious problem in both Services continued to be access to chaplains. However, it was being vigorously attacked, and not without some success. In both Services, there were large numbers of chaplains divided among more faiths and denominations than ever before. For example, by December 31, 1943, there were 6,398 chaplains in the Army divided among such smaller sects as Latter Day Saints, Seventh Day Adventists,

Unitarians and Universalists as well as such larger groups as the Baptists, Roman Catholics and Jews.[139] In the Navy, the number of chaplains on active duty averaged 721 in 1942, 1,774 in 1943, 2,346 in 1944 and 2,787 in 1945 (to August of that year).[140] These were divided among the smaller groups as well as the Jewish, Roman Catholic and larger Protestant Churches.[141] Included among these were the Nazarene, Quaker and Russian Orthodox Greek Catholic Churches.[142]

Of course, not every serviceman had access to a chaplain. In the Navy, for example, there were many units both on shipboard and ashore that were too small to be authorized a chaplain and too isolated to have ready access to the chaplain of another unit. The efforts made to help meet the religious needs of men in these units were great. Chaplains from other units visited them as often as possible and the Navy had books and pamphlets issued. Assistance was rendered by other agencies and the civilian clergy and line personnel were appointed as acting chaplains.[143] The same situation and the same solutions existed in the Army.[144]

The most pressing problem of all was what to do to assist men of the smaller sects who felt that in order to worship properly, they had to have access to a man of the cloth of their particular belief. "Groups exist within some Protestant denominations which feel that they cannot participate in the celebration of the Lord's Supper--Holy Communion--unless the Sacrament is administered by a clergyman, minister, priest or chaplain of their own respective denominations."[145]

The Navy and the Army went to great lengths to provide for the needs of these groups. The commandants of all naval districts were informed that,

> It is the desire of the Bureau of Naval Personnel, therefore, that naval personnel belonging to any such

denominational groups as are able to receive the Sacrament only from their own clergy are to be provided, insofar as circumstances permit, a ministry such as will meet their respective needs. On some stations no problem exists, due to the fact that chaplains are on duty who are qualified to take care of such groups. Where, however, such chaplains are not on duty it may be possible to invite a chaplain from a nearby station or a local clergyman to come on board for the purposes of conducting such special communion services for those who desire same.[146]

The Adjutant General of the Army described army policy in such cases. "If there are men whose needs cannot be met by the assigned chaplains, and who make request, the commanding officer is authorized to invite a clergyman accredited by the ecclesiastical head of that denomination to visit the post to minister to such men."[147]

Where no such problem existed, chaplains, where it was needed, might be expected to fill in for each other. A Catholic chaplain described one such service he held for Protestants aboard the ship of which he was chaplain. "On Sunday I would . . . have a general service for the non-Catholics which consisted of hymns, prayers, readings from the Scriptures, sermon and blessing."[148] This would not work the other way around since Catholics were prevented by canon law from participating in worship other than their own.[149]

Good chaplains, beyond doubt, rendered great service to those men who were of religious faith and perhaps to many who were not. Bill Mauldin tells of seeing "Catholic chaplain at Salerno gather up his white robes and beat a Focke-Wulf's tracers into a muddy ditch by a split second, then return and carry on the service as if nothing had happened."[150]

It is clear that by the close of World War II, the free exercise of religion enjoyed by those in military service was at its highest point up to that time. They were free to attend or not attend as they chose

and, more than ever before, had access to chaplains or civilian clergymen of their own faith.

> One of the great achievements in World War II, particularly when compared to the chaplaincy in World War I, was that serviceman in every part of the world and in every type of organization had the service of a chaplain.[151]

Clearly, the First Amendment freedom of religion, both "establishment" and "free exercise" clauses, were meaningful in the Armed Forces of the United States.

CHAPTER IV

COLD WAR AND KOREA 1946 to 1964

The Freedoms of Speech and Press

The Articles of War pertaining to the freedoms of speech and press, Articles 59 (advising another to desert), 62 (contempt toward certain governmental officials), 63 (disrespect toward superior officers), 65 (disrespect toward warrant and noncommissioned officers), 66 (exciting others to mutiny), 90 (provoking words or gestures), 95 (conduct unbecoming an officer) and 96 (the general article) remained unchanged until 1950. The same is true of the pertinent parts of the Articles for the Government of the Navy. Article 4 Sections One (attempting to make a mutiny) and Six (enticing others to desert in wartime), Article 8, Sections One (profane swearing), Three (provoking words or gestures), Four (fomenting of quarrels), Six (disrespect to superior officers), Eight (uttering seditious or mutinous words) and Twenty-one (enticing desertion in peacetime), and Article 22 (the general article). The year 1950 saw enacted the Uniform Code of Military Justice, which provided one law for all the branches of the armed forces.

The Articles of the Uniform Code of Military Justice pertaining to speech and press were seven in number.

Article 82.

(a) Any person subject to this code who solicits

or advises another or others to desert in violation of Article 85 or mutiny in violation of Article 94 shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but if the offense solicited or advised is not committed or attempted, he shall be punished as a court-martial may direct.

(b) Any person subject to this code who solicits or advises another or others to commit an act of misbehavior before the enemy in violation of article 99 or sedition in violation of article 94 shall, if the offense solicited or advised is committed, be punished with the punishment provided for the commission of the offense, but if the offense solicited or advised is not committed, he shall be punished as a court-martial may direct.[1]

Article 88.

Any officer who uses contemptuous words against the President, Vice President, Congress, Secretary of Defense, or a Secretary of a Department, a Governor or a legislature of any State, Territory, or other possession of the United States in which he is on duty or present shall be punished as a court-martial may direct.[2]

Article 89.

Any person subject to this code who behaves with disrespect towards his superior officer shall be punished as a court-martial may direct.[3]

Article 91.

Any warrant officer or enlisted person who--

. . . . . .

(3) treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer while such officer is in the execution of his office; shall be punished as a court-martial may direct.[4]

Article 117.

Any person subject to this code who uses provoking or reproachful words or gestures towards any other person subject to this code shall be punished as a court-martial may direct.[5]

Article 133.

Any officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.[6]

Article 134.

> Though not specifically mentioned in this code, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this code may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.[7]

The similarity between these Articles and the prior provisions of the Articles of War and Articles for the Government of the Navy should be noted.

The Uniform Code of Military Justice was revised in 1956. The only change of any importance was in Article 88 where the words "a Secretary of a Department" were deleted and the words "the Secretary of a military department, the Secretary of the Treasury" were substituted therefor.[8]

Policy Disagreements with Superiors

Between 1946 and 1964, there were two widely publicized cases touching on this aspect of freedom of speech in the military. The first in point of time, and certainly the most widely known, was the relief from command of General Douglas MacArthur by President Truman.

After the setbacks of the United Nations forces by the Chinese Communist armies in the Winter of 1950-51, MacArthur, in his attempt to have his way regarding the strategy to be employed, "released a bewildering barrage of special messages, exclusive interviews, and replies to editorial inquiries."[9] The thrust of this outburst or series of outbursts was that the troubles that then beset the United Nations troops were a result of the limitations that had been placed on the military measures he was allowed to use. These events led to two directives being sent to MacArthur (he was not, however, the sole recipient, although the person

for whom they were intended was obvious). The first directive required caution in, and clearance of, all but routine statements, while the second directive, ordered "overseas officials, including military commanders . . . to refrain from direct communication on military or foreign policy with newspapers, magazines, or other publicity media in the United States."[10]

Two days after the two directives, MacArthur, on December 8, 1950, wired the National Commander of the American Legion expressing his appreciation for the efforts of four veterans' organizations to obtain authorization for the bombing of Manchuria. While not violating the letter of the second directive, this action certainly violated its spirit, for the press learned of the message.[11] Then, on March 7, 1951, he issued, direct to reporters, a statement forecasting that unless there were substantial additions to his forces, all that could be hoped for in Korea was indecision resulting in great loss of life. This, he said, could only be averted by decisions which were beyond his power to make.[12] Finally, on March 25, 1951, he pulled the rug from under a plan devised by the President to smoke out Peking's disinterest in making a reasonable settlement in Korea. He issued a bellicose statement threatening to expand the war to China's territory. MacArthur had been advised of the President's plan prior to his making the statement that scuttled it.[13] He also, on March 20, 1951, wrote Joe Martin, the minority leader of the House of Representatives, a letter calling for victory in Korea. The letter did not state that it was confidential, and Martin read it on the floor of the House on April 5, 1951.[14]

On April 11, 1951, MacArthur was relieved of his command. President Truman has described his views on the problems with MacArthur.

> If there is one basic element in our Constitution, it is civilian control of the military. Policies are to be made by the elected political officials, not by generals or admirals. Yet time and again General MacArthur had shown that he was unwilling to accept the policies of the administration. By his repeated public statements he was not only confusing our allies as to the true source of our policies but, in fact, was also setting his policy against the President's.[15]

Truman reports that Generals Marshall and Bradley felt as he did. The latter decided that MacArthur's behavior was "a clear case of insubordination and the general deserved to be relieved of command."[16] General Marshall, after studying all the messages exchanged with MacArthur over the two years immediately preceeding, "concluded that MacArthur should have been fired two years ago."[17]

The other case was that of Vice Admiral Hyman G. Rickover. Admiral Rickover, the Navy's brilliant nuclear engineer, ran afoul of his Service's senior admirals with his constant championing of nuclear propulsion for warships and, more particularly, his insistance on the primacy of the nuclear powered submarine equipped to fire ballistic missiles from beneath the surface. This latter item, especially, upset the Navy high command many of whom were of the school that believed the aircraft carrier to be, if not the ultimate weapon, then at least something closely akin to it. This irritation at Rickover's views, which he vigorously pressed, apparently contributed to his twice being passed over for promotion from captain to rear admiral. This happened even though he had the backing of a former Secretary of the Navy, Dan Kimball.[18] The upshot of these two passovers was that Rickover would have been retired. However, the Senate took an interest in the matter, and the next rear admiral selection board that met was directed to promote one officer with specified qualifications that perfectly matched Rickover's.[19] The board caused Rickover to

be promoted. The Navy also dragged its feet on Rickover's promotion to vice admiral, which, if it had not occurred, would also have caused his retirement. Rickover was, however, promoted.

Political Involvement

Illustrative of this is the case of Major General Edwin A. Walker who was, at the time, commander of the 24th Infantry Division in Germany. After charges against Walker had been published in the Overseas Weekly, the Army commenced an investigation of his conduct. It found that Walker had "conducted a personal troop information and indoctrination effort that failed to comply with criteria established in Army Regulation AR 355-5, by making speeches containing remarks that were inflammatory and derogatory to past public officials, quoting and recommending material which was in varying degrees, non-factual, biased, and inflammatory in character, and arranging for speakers who gave inflammatory speeches."[20] Specifically, the investigation disclosed that General Walker "did state or infer that former President Harry S. Truman, former Secretary of State Dean Acheson, and Eleanor Roosevelt were leftist influenced or affiliated."[21]

In addition, it was discovered that Walker had caused to be printed in the division newspaper column entitled 'Commanding Generals Notebook" an article which, in part, stated that,

> One of the easiest ways of determining your Senator's or Congressman's record is by consulting the ACA Index. This carefully researched index to voting records has been prepared by the non-partisan Americans for Constitutional Action. A copy of this is available to all. You can phone Flak 7213 to have your representative's record determined before your vote is cast. When the American public understands the relationship of congressional voting records to national security, the cause of freedom will be revitalized.[22]

The voting recommendations apparently violated the Hatch Act and a Federal criminal statute as well as Army Regulation 355-5. The violation of the Army Regulation was punishable under Article 92 of the Uniform Code of Military Justice while the infraction of the criminal statute violated Article 134 of the Uniform Code. It was, however, decided not to prosecute and Walker merely received an oral reprimand which in part read, "Historically, and traditionally it has been the policy of the U.S. Army and, indeed, that of the U.S. Government, that members of the Army shall not, in their official capacity, participate in political activities, and, in particular, shall not use a position of authority to influence voting or other political action."[23] These events led to the cancellation of Walker's promotion to lieutenant general. He eventually resigned from the Army.

View of the Court of Military Appeals

Aside from the well-known cases of MacArthur, Walker and Rickover, there were many instances of ordinary members of the military service who contributed to the growing body of law pertaining to the freedom of speech and of the press. Beyond doubt, the leading case concerns Lieutenant Colonel Melvin B. Voorhees, United States Army.[24] Colonel Voorhees was charged with violations of Army regulations and directives in submitting a manuscript and parts thereof, concerning the Korean War to publishers without receiving the proper clearances. The importance of the case does not lie in the decision itself. Voorhees was finally cleared of all but a merely technical violation of an Army Regulation. The Court of Military Appeals and the Army Board of Review had determined that the only objections the Army had to the accused's writings dealt with matters of

policy and propriety and that this question had already been put to rest with an earlier directive from the then Secretary of War, Louis Johnson, which, in effect, limited the permissible censorship to matters concerning security. Rather, the importance lies in the comments made by the Judges of the Court of Military Appeals as to their views of how the First Amendment applies to these in the military. Chief Judge Robert E. Quinn wrote the majority opinion, in which Judge George Latimer concurred in part and dissented in part. Judge Paul Brosman dissented from the result.

Judge Quinn was at pains to be certain that his views on military freedom of speech were clear.

> I think I should make it clear that, in my opinion, every individual in the military service is entitled to the same Constitutional rights, privileges and guarantees as every other American citizen, except where specifically denied or limited by the Constitution itself.
> . . . . . .
> But there are differences between the civilian and military communities. In the military sphere, punishment for violation of law is not always an adequate protection against an abuse of a Constitutional privilege; then prevention rather than punishment becomes imperative.[25]

Judge Quinn approved the doctrine of prior censorship in those cases where "prevention rather than punishment becomes necessary to protect and preserve the lifeline of the republic in the theatre of military operations."[26]

Judge Latimer spoke even more directly to the question of freedom of speech.

> I believe it ill-advised and unwise to apply the civilian concepts of freedom of speech and press to the military service unless they are compressed within limits so narrow they become almost unrecognizable. Undoubtedly, we should not deny to servicemen any right that can be reasonably given. But in measuring reasonableness, we should bear in mind that military units have one major purpose justifying their existence; to prepare themselves for war and to wage it successfully. That purpose must never be overlooked in weighing the

conflicting interest between the right of the serviceman to express his views on any subject at any time and the right of the Government to prepare for and pursue a war to a successful conclusion. Embraced in success is sacrifice of life and personal liberties; secrecy of plans and movement of personnel; security; discipline and morale; and the faith of the public in the officers and men and the cause they represent. In connection with this litigation, it is to be remembered that while we can discuss the principles involved in a time of temporary peace, that is the period during which we must prepare for war or other eventualities. A principle which interferes with preparation for war may interfere with its successful prosecution; and a privilege given unwittingly in peace may be a death knell in war.[27]

Discussing the general law on this subject, Judge Latimer continued,

So far as I have been able to discover, the United States Supreme Court has never passed on the precise question which now confronts us. It has, however, pointed out one rule which seems to be the golden thread running through all of its pronouncements. That rule, paraphrased from a number of its opinions, is that while freedom to think is absolute of its own nature, the right to express thoughts, orally or in writing, at any time or place, is not.[28]

Returning to the problem of military free speech, Judge Latimer clearly set out his views why military censorship should encompass more matter than security.

At the heart of every successful military force are morale, discipline, and public support of the cause. An army which lacks these cannot hope to succeed. What I have previously stated in regard to security, applies in part to policy and propriety. A wise policy, a fair sense of propriety, underly morale and discipline. No man willingly lays down his life for a national cause which he is led to believe is unsound or unjust, but implicit in military life is the concept that he who so serves must be prepared to do so. If morale and discipline are destroyed, our forces cannot be trained adequately, and the nation must necessarily fail in battle. A few dissident writers, occupying positions of importance in the military, could undermine the leadership of the armed forces; and if every member of the service was, during a time of conflict, or preparation therefor, permitted to ridicule, deride, depreciate, and destroy the character of those chosen to lead the armed forces, and the cause for which this

country was fighting, then the war effort would almost surely fail.[29]

Judge Brosman recognized the peculiar situation of the military vis a vis freedom of speech and press.

> Although the areas of free speech and free press are sensitive ones, it is undeniable that a military person, by virtue of his status as such, may become subject to the imposition of special limitations on the freedom with which he may express his personal views. This circumstance is no more than a facet of the proper principle that the pressing demands associated with the successful conduct of war may authorize limitations, even discriminations, otherwise illegal . . . . Nonetheless, and even as to service personnel, I deem applicable to a partial--even a substantial--extent the doctrine of the Supreme Court that the rights deriving from the First Amendment to the Constitution are to be jealously safeguarded by the judiciary--this regardless of whether they may be said to enjoy a "preferred position."[30]

Disloyal Statements

The military restrictions on the freedoms of speech and press apply in a number of different situations. Of great importance, although not the most prevalent, is the suppression of expressions of disloyalty to the United States or its Government. Except in those situations covered by Article 88 of the Uniform Code (contemptuous behavior toward certain governmental officials) all other disloyal utterances are prosecuted under Article 134 (the general article).

A leading case concerning disloyal statements, during this period, was that of Private First Class Allen E. McQuaid of the United States Air Force.[31] McQuaid was charged under Article 134 with composing and posting at several places on Elmendorf Air Force Base, Alaska, a statement that laid the blame for the Korean conflict as well as all the wars in which the United States had been involved on the "International Bankers

and Capitalists," acknowledged the Soviet Union as seeking to right the wrongs of the United States and pictured the average soldier as merely a tool of the monied interests.[32]

The Air Force Board of Review[33] first considered the question of whether the document uttered by McQuaid was protected by the Constitution. Their conclusion was to the contrary. "It has long been recognized that the making by one in the military service of a disloyal statement, even in the absence of an allegation of an intent or design to promote disloyalty or disaffection, is punishable as conduct reflecting discredit upon the military service."[34]

The Board then went on to analyze the statement to see if it could be said to have been made with the design to promote disloyalty and disaffection among the troops. Such was found to be the case, as the statement presented a distorted view of the United States' defense effort and tended "to discourage faithful service to the country by members of the armed forces and unjustly malign our economic system."[35] Also, the urging of individuals to heed their consciences, "clearly places a premium upon and fosters disobedience and the disloyalty implicit therein is self-evident."[36]

The Board concluded that McQuaid was guilty of conduct to the prejudice of good order and military discipline or conduct reflecting discredit upon the armed forces in violation of Article 134.

> Considering the statements in their entirety, it is clear that they are of a seditious character as they excite discontent against the United States by those in the armed forces, encourage resistance to lawful authority, and urge disobedience upon the part of those in the military. It follows that such statements by their very words promote disloyalty by and disaffection among members of the armed forces and accordingly are disloyal to the United States.[37]

Somewhat similar is the case of Corporal Claude J. Batchelor, United States Army.[38] Batchelor, while a prisoner of war of the Communist Chinese in Korea, had written a letter to his home-town newspaper, the Winkler County News in Kermit, Texas. In it, he accused the United States of waging germ warfare in Korea. He urged the citizenry to put a stop to such practices.[39] The question was raised both at the court-martial and the hearing before the Board of Review as to whether or not there had been established the design or intent to promote disaffection among the civilian population with which Batchelor was charged. The defense contended that the accused had done no more than attempt to "start the engine of American public opinion," the purpose being to lawfully attempt to reverse policy.[40]

The Board of Review found to the contrary "We can scarcely conceive of a more painstaking and deliberate attempt to cause the American people to alienate or diminish their affection for, belief in, and goodwill toward their government or those in authority, thereby to stimulate such a revulsion among the American people that the perfidious administration would be forced to alter its policy."[41]

The Court of Military Appeals affirmed the actions of the Board of Review.[42] The free speech issue was apparently not raised on appeal.

That not every criticism of the United States is prohibited as disloyal is shown in the case of Coast Guardsman George E. Gustafson.[43] He was charged with making a disloyal statement designed to promote disaffection among the civil populations. The statement was, "Captain, you're no damned good and the Coast Guard is no damned good." The Board of Review overturned his conviction of violating Article 134 by making a disloyal statement.

> We are of opinion that the language in the case at bar, though reprehensible and vulgar, is incapable of characterization as disloyal to the United States. Furthermore, with all due consideration to the disgraceful circumstances and unredeeming context in which it was spoken, we cannot find that the language was used with a design to promote disaffection among the civil populace as alleged.[44]

In 1957, the question was presented to the Court of Military Appeals as to whether or not defiling the flag of the United States (the opinion declines to state the manner in which the defiling was accomplished) is tantamount to making a disloyal statement.[45] If so, the offense would support the punitive discharge of the offender, otherwise not. The Court felt that such was not the case.

> We have considerable difficulty in recognizing any similarity. Uttering disloyal statements has for its purpose the promotion of disaffection among troops, thereby causing servicemen to be disloyal to our form of government and useless to their cause. The acts committed by this accused were degrading to him and disrespectful to the flag. However, they probably would cause the onlookers to revolt at the desecrator--not to diminish their respect for the symbol of our National Government. Regardless of their contemptuous nature, accused's acts were not of a type which fall within the scope of uttered or written words which would promote disaffection among the troops.[46]

The act, a form of speech in the broadest sense, was nevertheless considered serious by the Court. "We are inclined to agree with Government counsel that the facts of this case make it an aggravated defilement and that the conduct of the accused should be severely punished."[47] Nevertheless, since the offense would not support the punitive discharge that had been approved by the Board of Review, its decision was reversed and remanded for reconsideration of punishment.

Disrespect for Military Superiors

Of the restrictions on the freedoms of speech and press, among the most important are those that have the purpose of assuring respect for superior commissioned officers. A leading case of this sort would appear to be that involving Private James L. Veracruz, United States Army.[48] The facts of this case, which are not so important as the general views expressed by the court, are that the accused and a lieutenant had an altercation in the latter's office. Veracruz constantly tried to interrupt the lieutenant and was told, heatedly, to "shut up." The accused said to the lieutenant not to tell him to "shut up" and when the argument became even more heated turned his back on the lieutenant and left the office. The Court, in affirming the finding of guilty of disrespect to the lieutenant, described the nature of the offense.

> The disrespectful behavior contemplated by Article 89 of the Code . . . is such as distracts from the respect due the authority and person of a superior officer. Such behavior may consist of either language or acts.[49]

The evil sought to be remedied should be obvious. A military organization could not function properly, or perhaps not at all, if those in authority were not given the respect due their position.

The same general considerations apply to noncommissioned officers. This is illustrated in the court-martial of Private George T. Sanders of the United States Air Force.[50] Sanders had said to a sergeant, "Who in the hell are you?" and "You only have four stripes and can't put me on detail," or words to that effect.[51] The Board of Review found that these words "would sustain the offense of behaving in an insubordinate and disrespectful manner toward a noncommissioned officer who was in the execution of his office, in violation of Article of War 65."[52]

Not surprisingly, this respect required of subordinate for superiors,

at least when the latter are acting in an official capacity, applies even between a basic airman and an airman first class who is so acting. This was established by the case of Douglas H. Spigner.[53] Spigner was, among other things, charged with violation of Article 134 (the general article) of the Uniform Code by "being disrespectful in language toward a named airman first class, his superior airman who was then in the execution of his office."[54] The language consisted of the phrase "Oh, . . . You."[55] The Board of Review left no doubt that an offense in violation of Article 134 had been committed. After describing the incident which occurred while the airman first class was in charge of a work detail of which Spigner was a member, the Board commented on the difficulty of imagining 'an act more directly prejudicial to good order and discipline.'[56]

It is of importance to note that Article 89 of the Uniform Code prescribes all disrespect to superior officers, whether acting in an official capacity or not, while Article 91(3) only prescribes such disrespect by warrant officers and enlisted persons toward warrant officers, noncommissioned officers and petty officers when the latter three are in the execution of their office. Although there is little doubt that disrespect of these three classes of officials while not in the execution of their office could be punishable as a violation of Article 134 of the Uniform Code (the general article), the relative importance of the respect due to superior commissioned officers should be obvious. The same could be said of disrespect to those in authority who are below noncommissioned status. Disrespect of them, even while in an official capacity, must be charged under article 134. Such is the nature of the respect due between members of the military, that a superior officer

can be charged under Article 133 of the Uniform Code (conduct unbecoming an officer and gentleman) for using profanity toward a commissioned officer of lower grade.[57]

In spite of the military's unfettered emphasis on the respect required (in derogation of freedom of speech) among its members, especially toward superiors by subordinates, or perhaps because of it, a great body of law has developed as to just what is disrespect and when might it not be. Much of it occurred during the period now under consideration.

Perhaps the leading case concerning when disrespectful conduct is excused deals with the situation in which Basic Airman Juan R. Noriega found himself.[58] A party was given for the enlisted men in the accused's squadron. During the course of the festivities, one of the officers of the squadron acted as bartender for those attending. He did not wear a shirt while performing this function and did not have on any insignia of rank. The accused became intoxicated and belligerent and, as two of his companions were taking him back to the barracks, they were stopped by the officer-bartender, Lieutenant Tipton, and told to let the accused have more to drink. They complied and somewhat later Noriega came up to the bar, assumed a fighting pose and said to the Lieutenant, "Hey, Tip, let's fall out on the green." Tipton turned and walked away without making reply. This conduct on the part of Noriega resulted in a charge of violation of Article 89 of the Uniform Code (disrespect to superior officers). The accused was found guilty. The question before the Court of Military Appeals was whether or not his conduct, under all the facts and circumstances, supported the finding of guilty.

Chief Judge Quinn, for the majority of the Court, found that Tipton did not find the conduct and words of Noriega objectionable (he did not

testify against the accused at the court-martial) and "in appearance and conduct . . . he [Tipton] was simply a bartender."[59] Therefore, as a matter of law, the conduct of Noriega "did not . . . detract from the authority and the person of Lieutenant Tipton within the meaning of Article 89."[60]

A part of the comments of Judge Latimer in dissent are pertinent to this particular limitation on freedom of speech.

> Obviously, there can be occasions when an officer steps so far out of character that he is not entitled to the consideration due his rank and so, if this record disclosed that the Lieutenant had forfeited his right to be respected by the airmen present at the party, the accused's actions could not be made the basis for criminal prosecution. That rule, however, must be considered in connection with the necessities of the service. Certainly, one must bear in mind that a military service, as distinguished from the officer offended, has an interest in maintaining discipline, even at organization parties, and that individual members of the service cannot consent to the commission of crimes that undermine military discipline.[61]

In the Montgomery case[62] the Board of Review, by way of dicta, discussed another aspect of the limitation on the freedom of speech imposed to facilitate the respect due superior from subordinate. After mentioning that, under military law, it is not proper to apply strictly the provisions of Article 89 of the Uniform Code (disrespect toward superior officers) to what transpires in a purely private conversation between superior and subordinate, the court discussed the conduct of Lieutenant Montgomery.

> Admittedly, when an officer joins a poker game in which officers senior in rank to him are playing, by the very nature of the transaction he is usually accorded the privilege of engaging in a greater degree of familiarity than is usually the rule in daily social contacts among officers. Nevertheless, no officer, by reason of his participation in a poker game with other officers, acquires the right, regardless of his rank,

> to behave and use the obscene and provoking language which the accused did on this occasion.[63]

The idea that it is principally the interests of the service that are to be protected through the outward manifestations of respect required of service personnel to their superiors is further bolstered by the case of Private Henry C. Richardson, United States Army.[64] While Richardson was at a military police station to be questioned about an assault and battery committed on a fellow soldier, he became belligerent and told a sergeant who tried to quiet him down, 'Sergeant, well if you don't like it I'll take you in the back room and fight you too,'[65] He had previously made the same remark to a corporal. The Court, in discussing the pertinence of the record being silent as to whether or not the corporal and the sergeant considered the remarks of the accused disrespectful, stated that

> the feeling or opinion of the noncommissioned officers regarding the remarks is irrelevant. The gravamen of the offense lies in the disrespectful conduct toward the noncommissioned officers in the execution of their office.[66]

Given the surrounding circumstances, even mild words, spoken in a respectful manner may constitute disrespect. The case of Private Lawrence L. Burgess, United States Marine Corps is illustrative of this limitation on free speech.[67] The accused was ordered to perform the duties of sentinel and refused, claiming that it was not his turn to do this. The corporal who had given the order took Burgess to the officer in charge, a lieutenant, who also ordered him to act as sentinel. To this, Burgess replied: "No sir, I don't think I will, so you might as well call the O.D. and lock me up."[68] The Board of Review held that the words were, per se, disrespectful. Thus, the mild manner in which they were said

could not change their character. The Board found authority for its position in the writings of Colonel Winthrop. "Disrespect by words may be conveyed by . . . an open declaration of an intention not to obey his [commanding officer's] orders."[69]

That disrespect may also be evidenced the other way around is indicated in the case of Private Preston T. Johnson, United States Air Force.[70] A sergeant in Johnson's organization gave him an order which he refused to obey. The accused's commanding officer, Captain McCallum, went with the sergeant to the accused's barracks, confronted him, and asked if he intended to obey the sergeant's order. "The accused failed to come to attention and did not from his actions display any of the usual evidences of respect for him, but replied in an insolent manner: 'That's the general idea.'"[71] The Board of Review found that the accused had been guilty of disrespect.

> With regard to the specification alleging disrespect in violation of Article of War 63, both of the prosecution witnesses who heard the alleged words and observed the circumstances under which they were uttered characterize the actions of the accused as insolent. Although this may in a sense be said to be the conclusion of those witnesses, the Board of Review is of the opinion that the Court, having heard the testimony of the prosecution witnesses and of the accused, and observed their manner of testifying, was fully justified in its finding that the behavior and the words of the accused were disrespectful.[72]

Thus, words which are not, per se, disrespectful, may become so by the manner of speech and deportment of the one uttering them.[73]

Spoken words do not have to refer to the superior officer spoken to in order to constitute disrespect.[74] The accused here had said to a lieutenant that 'this bunch of . . . are trying to . . . me.'[75] The Board of Review commented that no doubt exists "that the vile and obscene language

used by the accused to his superior officer is offensive to such a degree that it would be regarded as bad manners and rudeness in all levels of polite society."[76] This failure to show proper respect for the lieutenant, in spite of the fact that the words did not refer to him, together with the accused's demeanor, provided sufficient basis for conviction of violation of Article 89 of the Uniform Code (disrespect toward superior officer).

The evidence, however, of disrespect must be strong, when the words do not refer to the superior (at least when he is a noncommissioned officer) nor any other person.[77] Private Whitaker, when directed to fill out a questionnaire told the corporal, "to hell with it." The corporal stated that the accused spoke in a moderate tone of voice and used no gestures, and was not in his opinion, disrespectful. The Board of Review found that the words of the accused did not constitute disrespect since they "could reasonably be construed as not being directed 'toward' anyone at all but merely to be an automatic explosion caused by the accused's neurotic illness."[78] That the illness was also possibly a factor considered, was indicated by the Board. "Under the circumstances of this case the accused's state of mind--his animus,--his intent--is a material consideration . . ., and the fact that the evidence shows that he was not directing his remarks toward anyone at all tends to negative any criminal intent."[79]

The fact that the disrespectful words directed toward a superior by a subordinate result from an illegal order issued by the superior is not a defense.[80] The accused, Seaman Apprentice Joseph A. St. Croix, had been ordered placed in irons by the officer of the day aboard his ship. Upon learning of the order, the accused "expressed his displeasure in a stream

of obscenities directed at the Ensign.[81] The Board of Review assumed, for the purposes of argument, that the order to place the accused in irons was illegal and then considered whether an illegal order would excuse swearing at the officer who gave it.

> Assuming a situation where an unquestionably illegal use of irons is being attempted, opposition to such use by physical force might well be justifiable. A man is not bound to submit to an assault upon himself and may oppose force by force in self defense . . . There is no logical analogy, however, whereby we might regard obscene language as an action in self defense. Opprobrious words do not constitute force nor are they appropriate to repel an assault. Accordingly, we find no merit in the contention that the offense was justifiable.[82]

The question, however, became moot as the Board went on to find that the order to place the accused in irons was legal.

The person in military service accused of disrespect of a superior must, however, be aware of that person's status as such.[83] The usual factor involved in such cases is the effect of the intoxication of the accused on this knowledge. If the accused is so intoxicated that he fails to recognize the superior for what he is, this is sufficient to require the accused be acquitted on the charge of disrespect.[84]

With regard to voluntary intoxication, it is no defense that the accused was too drunk to intend disrespect to the superior. Specific intent is not an element of the offense of disrespect.[85] However, if a person accused of disrespect is so drunk that he cannot entertain a conscious thought, this would excuse the disrespect.[86] It is difficult, however, to see the importance of the last consideration. If a person was too drunk to entertain a conscious thought, then he was surely too drunk to be aware that the person to whom he was showing disrespect was a superior.

The suppression of disrespect to superiors is one of, if not the, most important limitation placed on the freedoms of speech and press by

the military. That it is considered to be a limitation necessary for the preservation of discipline, is seen by the fact that the prime consideration is the respect for the superior's position rather than his personal feelings. Discipline is vital for a smoothly functioning military society.

Provoking Words

Of almost equal importance are the restrictions placed on the freedom of speech and press in the interest of harmony among those in the military, be they in the relationship of superior and subordinate or equals. This restriction has, since 1950, been found in Article 117 of the Uniform Code. It prohibits provoking words and gestures between those in the armed forces. The leading case on this subject is that involving Private First Class Harry L. Carter of the United States Air Force.[87] Carter was accused of saying to two lieutenants and a sergeant: "I got this scar fighting for you . . . what kind of democracy is this? . . . on democracy? Communist? Hell yes I'll be for Communism! . . . I'll be for it!"[88] After mentioning that the conduct of the accused could also have been charged as disrespect to superior officers and disrespect to a sergeant in the execution of his office, the Board of Review came to grips with the problem of the effect of constitutionally guaranteed freedom of speech on the enforcement of this restriction on what Carter had to say.

> The offense charged here is the use of reproachful and provoking speech, and while freedom of speech is protected by the First Amendment of the Constitution, such protection does not extend to disturbances of the public peace . . .
> . . . . . .
> The history of the 90th Article of War conclusively shows that its purpose is to prevent disorders, breaches or disturbances of the peace, or conduct which has a tendency to a breach of the peace. In the instant case it is apparent that the language directed by the accused

> to other members of the military service was of a nature likely to induce a breach of the peace.[89]

The question of whether one accused of using provoking words or gestures toward another person in the military must realize the military status of the other person has been answered in the negative.[90] There, the Board of Review stated that it was "convinced that it was not intended by Congress that knowledge by the accused of the identity of the object of his speech or gestures be considered an element of Article 117 offenses."[91]

Some doubt has been thrown on this by dicta in a more recent case decided by the Court of Military Appeals.[92] There, the Court assumed for the purposes of argument, that violations of Article 117 of the Uniform Code required that the person charged with such violations must in fact know that the persons to whom he uses provoking words or gestures are in the military. United States v. Bowden was not mentioned. It is not clear why the Court would assume, even for purposes of argument, the necessity of knowledge if there was not at least some doubt in the minds of the judges as to the status of the law. The issue was not, however, ruled upon.

Returning to United States v. Bowden for a moment, it is interesting to note the characterization of Article 117 of the Uniform Code as compared with Article 134 (the general article).

> The offense denounced by Article 117 has characteristics which denominate it as akin to breach of the peace offenses in civilian jurisprudence, or, in the military world, to disorderly conduct offenses, violative of Article 134. Thus, regardless of whether the person to whom the opprobrious language is directed is in the service or not, the conduct is a military offense. If the victim is subject to the Code then the offense becomes a specific one under Article 117. The only discernable reasons for the existence of the offense, as we

> view it, are deference to military tradition . . . and to provide the services with a specific, readily described, weapon to prevent disturbances within military establishments.[93]

That the overall disciplinary consequences intended by the ban on provoking words and gestures are the same as those which, in the main, underlie the prohibition against disrespect to superiors is made clear in the case of Seaman Apprentice William James Hughens, United States Navy.[94] Hughens was charged with directing a provoking gesture toward a superior officer. The problem was that it occurred behind the officer's back and without the officer's knowledge. It was observed by a third person (but was not directed toward him). Counsel for the accused argued before the Board of Review that "for the gestures to be provoking they must be such as to provoke the person toward whom directed and if he is unconscious of them they cannot fulfill that essential requirement."[95] The Board, however, met this argument head on.

> Although the argument is ingenious we do not subscribe to the theory. The long history in Anglo-Saxon military organizations of punishment of use of provoking words or gestures toward another subject to the same law shows that the provision is a preventive measure designed to reduce clamor and discord among the members of the same military force. If provoking gestures could with impunity be directed toward superior officers and others of the same organization from close behind their backs, although in plain view of others in the same organization, obviously discord and clamor would not be lessened but increased.[96]

Virtually the total thrust of the cases discussed above in this chapter have considered speech rather than press. This is not surprising as the exercise of speech is a much simpler matter than the use of the press. Nevertheless, it should be clear that the purposes for which the military restricts the freedom of speech could as easily be subverted by printed matter. Perhaps if anything, printed matter would be

an even greater detriment to the discipline sought to be maintained in the military.

Advising Certain Unlawful Acts

There is a further restriction on the freedom of speech of those in the military. Although the cases that follow in this chapter dealing with it all involve speech, the use of the press in similar manner would be at least equally objectionable. This is the restriction on soliciting or advising certain unlawful acts. That the offense is highly prejudicial to discipline is clear. This is brought home by the case of Private Cornell Turner, United States Army.[77] The crux of the holding is succinctly described by the Board,

> The credible evidence shows that on the morning of 7 January 1953, at Nagoya, Korea, the accused, a member of a prisoner work detail, walked among the other prisoners of the same detail, stating, "We ain't going to work; we ain't going to drill." Later, after the noon meal had been completed and a total of approximately 50 prisoners, including the accused, were grouped together, the accused announced loudly to the group that no one would return to work. On each occasion aforementioned, the accused indicated that those who worked were to be subjected later on to corporal punishment. Two of the prisoners (one a defense witness) testified that their behavior at the time in question was impelled by fear of the accused's threats. Although not necessarily an essential matter of proof to support the approved findings of guilty, the evidence further shows that a mutiny occurred, because, by the accused's acts on the first occasion, all work stopped and was not resumed despite the exhortations of the guards, and, on the second occasion, the guards were never able to induce any of the prisoners to return to their work. Although several other prisoners were heard to make remarks similar to those of the accused, the evidence, in our opinion, establishes that his efforts beyond a reasonable doubt, constituted a serious request or advice to commit mutiny.[78]

The offense of advising another to commit an act in violation of the law need not be charged under Article 82 of the Uniform Code (solicita-

time). The offense of Lieutenant Booker T. Jackson in advising an enlisted man to absent himself from his unit without permission was held to sustain a conviction under Article 134 of the Uniform Code (the general article).[99]

Any offense committed by a person in the service weakens, to some degree, the cohesion and discipline vital to a military organization. Speech, in the form of solicitation or advice to commit an offense, is thus forbidden for what is, in the final analysis, the same reasons as disrespect to superiors and provoking words to another in the military.

The Freedoms of Petition and Assembly

As previously indicated, the applicable provisions of the Articles of War and Articles for the Government of the Navy, did not change up to 1950, with the exception of Article of War 121, which in 1948 was slightly changed procedurally without, however, affecting its operation.[100]

With the adoption of the Uniform Code of Military Justice, in 1950, the same law covered all of the military services. Two of its articles dealt with the problems of petition and peaceful assembly. Article 94 prohibited mutiny, while Article 138 specified the procedure to be used to complain of wrongs:

> Article 94.
> (a) Any person subject to this code--
> (1) who with intent to usurp or override lawful military authority refuses, in concert with any other person or persons, to obey orders or otherwise do his duty or creates any violence or disturbance is guilty of mutiny;
> (2) who with intent to cause the overthrow or destruction of lawful civil authority, creats, in concert with any other person or persons, revolt, violence, or other disturbance against such authority is guilty of sedition;
> (3) who fails to do his utmost to prevent and suppress an offense of mutiny or sedition being

committed in his presence, or fails to take all reasonable means to inform his superior or commanding officer of an offense of mutiny or sedition which he knows or has reason to believe is taking place, is guilty of a failure to suppress or report a mutiny or sedition.

(b) A person who is found guilty of attempted mutiny, mutiny, sedition, or failure to suppress or report a mutiny or sedition shall be punished by death or such other punishment as a court-martial may direct.[101]

Article 138.

Any member of the armed forces who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redressee, may complain to any superior officer who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom the complaint is made. That officer shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department concerned a true statement of such complaint, with the proceedings had thereon.[102]

The importance to the military of the grievance procedure outlined in Article 138 is clear. Any unauthorized assembly for the purpose of petitioning for redress of grievances, no matter how peaceable that assembly may be, is quite rightly felt to be injurious to military discipline. Such assemblies may very well be considered to be mutinies. Servicemen are, of course, free to write their representative in Congress, or to other governmental officials, but it quite frankly, puts the military in a bad light when this happens. The armed forces should be able to remedy valid grievances within the military family. The authority for this is Article 138.

Illustrative of the unique problem an assembly of military personnel to protest grievances is the Watson case.[103] There, certain prisoners staged a noisy protest demonstration at an Army Retraining Center. Being protested was the administrative segregation of one Center's inmates.

There is nothing in the opinion of the Court of Military Appeals to indicate that such violence accompanied the protest. While the Constitution protects only peaceful assemblies, it is impossible to say that many of those here involved were not merely engaged in a peaceable assembly. In fact, the commander of the Center testified that the accused was respectful to him in that he addressed him as "sir" and that no threatening gestures were made toward him by anyone. The Court found error in the failure of the law officer (military judge) to charge the court-martial on the lesser offense included in mutiny: riot. The difference between mutiny and riot is not important, rather it is important to see that it was the assembly itself that was the act objected to. It is unfortunate (for purposes of illustration) that this assembly and all others discovered to have taken place during the time period covered by this chapter were in military penal or correctional institutions. Such surroundings do not create the best of examples, since such assemblies in civilian prisons are not allowed. A better illustration will have to wait until the next chapter. Suffice it to say, that unauthorized assemblies, even peaceable ones, are distinctly detrimental to military discipline.

The Freedom of Religion

Mandatory Attendance at Worship Services

Although the Army had long since ceased to recommend attendance at divine services, such a recommendation remained in the Articles for the Government of the Navy until 1950. The Uniform Code of Military Justice makes no mention of divine service. However, these provisions of the Articles for the Government of the Navy were retained as Federal law. Title 10, Section 6031 of the United States Code provides as follows:

10 U.S.C. Section 6032

. . . . . .

(b) The commanders of vessels and naval activities to which chaplains are attached shall cause divine services to be performed on Sunday, whenever the weather and other circumstances allow it to be done; and it is earnestly recommended to all officers, seamen, and others in the naval service diligently to attend at every performance of the worship of almighty God.

(c) All persons in the Navy and Marine Corps are enjoined to behave themselves in a reverent and becoming manner during divine service

The Senate Report on the bill containing these provisions explains their continued life. "These are provisions which are of historical existance to the Navy and which the Navy desires to retain as statutory provisions."[104] Even given the fact that these provisions remained law, by the close of World War II, compulsory attendance at divine service was no longer a problem.

Free Exercise and Military Courtesy

Another military policy was, however, considered, by some, to be in derogation of the religious liberty protected by the First Amendment. This was the traditional military courtesy of the salute. This was not the first time the problem had come up,[105] but an Air Force Board of Review gave it renewed consideration in 1954.[106]

Airman third class Ralph C. Morgan, Jr was a Jehovah's witness. For religious reasons, he requested that his squadron commander excuse him from the ceremony of retreat, when all present were required to salute the flag of the United States. As he explained it, "recent study of the tenets of that creed had convinced him that saluting either the flag or an individual bespoke idolatry."[107] After attempting, without success, to convince Morgan that the salute would not actually compromise his religious beliefs, the officer told him that he could not be

excused and that the refusal to obey an order was a serious offense. Nevertheless, at both a "dry run" and at the retreat ceremony itself, Morgan refused direct orders to salute the flag. These refusals resulted in his being tried and convicted by court-martial of refusal to obey a lawful order.

On appeal, the Board of Review first considered the issue of Morgan's freedom of religion. The Board, in disposing of this issue, adopted in toto the opinion of the review of the Staff Judge Advocate of Keesler Air Force Base. After stating that he could find no military precedent on point, that officer bottomed his opinion on two decisions rendered in the civilian Federal Courts. The first of these was the Barnette case,[108] The Supreme Court had there held that it was unconstitutional for a state board of education to require a child to salute the United States flag or recite the pledge thereto. To do so, said the Court, "transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment of our Constitution to reserve from all official control."[109] In professing this holding, the Supreme Court made the following statement:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[110]

There was, however, an exception which the Supreme Court placed in a footnote and which was relied on by the Board of Review:

> The Nation may raise armies and compel citizens to give military service . . . It follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable to those in civilian life.[111]

The Board then cited the McCord case[112] in which a Federal Appeals Court refused to order the release from confinement and discharge of a serviceman who was a minister in the Watch Tower Bible and Tract Society and who found its tenets to conflict with his military obligation to salute the flag and his superior officers. There the Court had held that the military's saluting requirements "are not intended to interfere with religious liberties, and the enforcement of the regulations by a proper military tribunal does not violate the Constitution of the United States."[113] This case, together with the footnote in Barnette proved to be sufficient to hold that Morgan's religious freedom was not violated.[114]

Although discussion of most of the novel claims of military activities being in violation of the First Amendment's guarantee of freedom of religion must wait until the next chapter, the Camps case[115] falls in the present one. The case reached the Federal District Court by petition for writ of habeas corpus, Camps then being in military confinement pursuant to sentence of court-martial upon conviction of desertion. After various other matters, the petitioner challenged the constitutionality of the provision in the Manual for Courts-Martial which provides that each member of the court-martial shall vote on sentence to be imposed regardless of his vote on the issue of guilt and that the sentence must be determined by a three-fourths vote. It was the petitioner's contention that the provision compelling a court member to vote on the sentence irrespective of the fact that he may have voted against conviction, might offend that member's conscience and, thereby, interfere with the free exercise of his religious beliefs. The Court made short shrift of this argument. It pointed out that, in the first place, the vote on conviction and the vote on sentence are separate steps; and thus, there is no incon-

sistency in requiring a two-thirds vote for conviction and a three-fourths vote for sentence. In the second place, the Court was not of the opinion that the petitioner could raise another party's constitutional rights in his own defense. One must admire, however, the ingenuity of Gampo or his counsel.

Access to Chaplains

The compatability between the military and freedom of religion was at a high level and seemed to be improving. This is exemplified by the military's handling of the "free exercise" problem in its relationship to access to a chaplain, especially a chaplain of one's own religious persuasion.

With the rapid demobilization of the Army at the close of World War II, the number of chaplains declined from 8,141 in the late Summer of 1945 to 4,481 by February 8, 1946.[116] By the middle of 1950, the number had further declined to 736.[117] However, the total size of the Army had also drastically declined so that the reduced number of chaplains did not reflect a reduced coverage of the religious needs of the troops. In fact, the number of the Army personnel per chaplain had improved, for by 1950, both in law and fact there was one chaplain for each 850 persons in the Army.[118] By 1956, with the growth of the Army, the number of chaplains had increased to 1,216.[119]

Although the ratio of number of personnel per chaplain also improved in both the Air Force and the Navy, neither, in 1950, was doing as well as the Army, although both were authorized a lower ratio. In June of 1950, the Air Force had 469 chaplains for a ratio of one chaplain for each 900 persons in the Air Force. The ratio authorized was one to each

800.[120] A year later 350 chaplains had been added and by 1955 there were 1,150 chaplains authorized, or one chaplain for each 360 personnel.[121] From 1955 to 1960, the number of Air Force chaplains fluctuated between 1,000 and 1,200, reflecting to some extent the changing number of Air Force personnel.[122] In 1950, surprisingly, the Navy had the highest actual ratio: one chaplain for each 1,100 naval personnel.[123] The actual number of chaplains was 436. By 1953, it had more than doubled to 892.[124] By 1957, the total had declined slightly to 813.[125]

By this period of time, the problem of the small religious sects was well on the way to as much of a solution as would ever be reasonably possible. In 1956, Air Force chaplains represented 50 faiths and denominations.[126] Between 1946 and 1957, 52 faiths and denominations were represented in the Navy Chaplaincy.[127] No figures were located for the Army, although the number was surely about the same. The number of chaplains representing each faith and denomination was arrived at by using a quota system. The Air Force system is illustrative.

> Working quotas were established on the basis of the annual U.S.A.F. chaplain authorization, Bureau of Census reports, the Yearbook of American Churches statistics, and demonstrated need which required some adjustment. Protestant quotas were determined as follows: each denomination with 50,000 or more members was assigned the percentage of chaplains equal to its denominational percentage strength listed in the Yearbook of American Churches; denominations with less than 50,000 members were placed in a miscellaneous group and given a percentage figure equal to the grouped denominational percentage strength.[128]

The problem of actual chaplain coverage for service personnel belonging to the smaller sects remained, and by its very nature, defied a complete solution. The problem continued to be solved to as large a degree as possible.

> Related to denominational quotas is the problem of denominational assignment. Wherever possible, an equitable balance was maintained for providing a full Catholic, Protestant and Jewish ministry. The service of Jewish chaplains was complicated because of Orthodox dietary and travel restrictions which led to Orthodox chaplains being assigned to large bases, and Reformed and conservative chaplains to areas requiring constant travel. A similar problem is that some Protestant chaplains cannot in conscience conduct a general communion service or administer the rite of infant baptism. All major commands in 1954 were directed "to annotate their requisitions to include major denominations of Protestant chaplains and . . . indicate in the remarks section . . . certain functions that the officer must be qualified ecclesiastically to perform, such as infant baptism and general Holy Communion."[129]

The nearest thing to a solution of the problems was for chaplains, especially those of small sects, to ride circuit. For example, in the Navy, a chaplain was attached to the staff of each squadron of destroyers to minister to the needs of the men aboard the vessels in that command.[130] This answered the need of isolated units, but did not help the problem of the smaller sects, or for that matter, those of faiths other than that of the staff chaplain. In such situations, lay personnel filled in, as on the U.S.S. John R. Craig, where the Roman Catholic Services were conducted by the Executive Officer and Protestant Services by the First Lieutenant.[131] Visiting civilian clergyman also, as in the past, helped to fill the gap.[132]

The problem of adequate coverage was compounded by the increasing number of military dependents who were not counted at first in the personnel figures upon which chaplain authorizations were based. A Presidential Committee reported in 1950 that:

> Servicewide, the ratio of chaplains to military personnel is about 1 to 900. However, when dependents family are included, this ratio becomes 1 to 1,800, and when administrative chaplains, chaplains on leave,

chaplains sick and in transit are deducted, this ratio becomes about 1 to 2,500.[133]

This problem began to be corrected in the late 1950's in the Air Force,[134] and, it must be presumed, in the other services as well. Thus the all-out effort to guarantee to the fullest extent possible, the free exercise of religious belief, assisted by a chaplain on one's own faith, was continued and improved in this period.

CHAPTER V

VIETNAM 1964-1971

The Freedoms of Speech and Press

Those seven Articles of the Uniform Code of Military Justice heretofore identified as limiting the freedoms of speech and press of those in military service were not changed during this period. However, there was a marked change in the development of the case law surrounding them. The era of Vietnam was, and is, the era of unprecedented challenge to the restrictions on the military's freedom of expression concerning the affairs of the Nation and the world.

Disrespect for Governmental Institutions and Officials

This matter has always been of some concern to the military. From the American Revolution onward, the military has suppressed words or writings of its members expressing contempt for the Government or certain of its major officials. But, with United States' involvement in the Vietnam War, the number of those in uniform expressing dislike and contempt for the United States Government and leaders reached a new high.

The leading case (at least if measured in terms of national interest) is that of Doctor Howard B. Levy who, at the time of the events that gave rise to the charges against him, was a Captain in the United States Army.[1] Upon going on active duty on 9 July 1965, he was assigned as

chief of the dermatology service at the U. S. Army Hospital, Fort Jackson, South Carolina. As part of his duties, he was ordered to conduct the dermatology portion of seven weeks training courses then being offered for Special Forces aidmen. Initially, Captain Levy performed these duties as directed, but finally, in the latter part of 1966, refused several direct orders to continue their performances. This action resulted in his being charged under the Uniform Code of Military Justice, and convicted. It is, however, the period of time when he was still conducting the training which is of interest. During this time, it was charged by the Government that he did

> wrongfully and dishonorably make the following statements . . . to wit: (1) Intemperate, defamatory, provoking, and disloyal statements to Special Forces enlisted personnel present for training in the United States Army Hospital, Fort Jackson, South Carolina, and in the presence and hearing of other enlisted personnel . . . as follows: "I will not train Special Forces personnel because they are 'liars and thieves,' 'killers of peasants,' and 'murderers of women and children.'" . . .; (2) Intemperate and disloyal statements to enlisted personnel . . . as follows: "I would refuse to go to Vietnam if ordered to do so. I do not see why any colored soldier would go to Vietnam. They should refuse to go to Vietnam; and, if sent, they should refuse to fight because they are discriminated against and denied their freedom in the United States and they are sacrificed and discriminated against in Vietnam by being given all the hazardous duty, and they are suffering the majority of the casualties."[2]

It is also reported that he made statements on the order of, "I hope when you get to Vietnam something happens to you and you are injured," to special forces personnel while in the presence and hearing of other enlisted personnel.[3]

These statements resulted in his being charged under Articles 133 and 134 of the Uniform Code of Military Justice. He was convicted by court-martial at Fort Jackson and sentenced to dismissal from the service, for-

feiture of all pay and allowances and confinement at hard labor for three years.[4] One point argued on the appeal of the conviction to an Army Board of Review was that he had been denied the freedom of speech guaranteed to him under the First Amendment of the United States Constitution. The Board of Review disposed of this contention in the following language:

> The circumstances under which the remarks were uttered, the persons to whom they were directed and the very nature of the statements themselves, compel the obvious and inescapable conclusion that they were, in fact, disloyal and were intended to and had the reasonable tendency to promote disloyalty and disaffection. The evidence is overwhelming that such conduct is discrediting and prejudicial to good order and discipline. It cannot be denied that the right to freedom of expression guaranteed by the First Amendment should be and is zealously protected by the courts, but no one can seriously contend that the exercise of that right is totally unrestricted under any circumstances. Were it otherwise it would permit the destruction of the very right itself, for if one who has solemnly sworn to uphold the Constitution can promote by words the disaffection and disloyalty of others charged with the same duty, that which has been guaranteed would soon have no guarantors.[5]

The Court of Military Appeals refused to hear Captain Levy's appeal from the decision of the Board of Review.[6] Levy is apparently still in the courts seeking reversal of his conviction.[7]

Similar to that of Captain Levy were the companion cases of United States v. Daniels[8] and United States v. Harvey.[9] Daniels and Harvey were Black marines undergoing training at Camp Pendleton, California, prior to deployment to Vietnam. They were charged with several instances of making disloyal statements in violation of Article 134 of the Uniform Code of Military Justice. The charges arose out of their having declared, numerous times, to other Black marines who were also scheduled to go to Vietnam that the Blacks did not have a country, that the Vietnam War was

a "white man's war," that Blacks did not belong in Vietnam and that they shouldn't go to Vietnam. The two were convicted by court-martial and their convictions were upheld by Boards of Review.[10] On appeal to the Court of Military Appeals, their convictions were reduced to lesser included offenses because of errors made in the legal instructions to the court-martial.

Of importance here, however, is the Court of Military Appeals' handling of the contention that the defendants' right to freedom of speech had been violated. In noting Daniels' argument that the statements attributed to him were merely "expressions of grievances and private opinions,"[11] the Court said that "the right to believe in a particular faith or philosophy and the right to express one's opinions or to complain about real or imaginary wrongs are legitimate activities in the military community as much as they are in the Civilian community."[12] But, the Court went on to point out that "if competent evidence reveals conduct not protected by the Constitution and condemned by statute the findings [of guilty] are proper."[13] The Court, after considering the evidence that was before the court-martial, concluded that it was sufficient for the court-martial to believe, beyond a reasonable doubt, that both defendants had intended to interfere with or impair the loyalty, morale and discipline of the other Black marines and that there was a "clear and present danger" of this being accomplished. Therefore, the statements were beyond that freedom of speech protected by the First Amendment.

U.S. v. Howe,[14] a case of a slightly different nature, arose in 1965, at the very beginning of our Vietnam troop buildup. At "peace demonstrations" in El Paso, Texas, Second Lieutenant Henry W. Howe, Jr. then sta-

tioned at Fort Bliss, Texas, marched with the demonstrators (he was apparently in civilian clothes) carrying a sign that read, on one side, "LET'S HAVE MORE THAN A 'CHOICE' BETWEEN PETTY IGNORANT FASCISTS IN 1968," while on the other, "END JOHNSON'S FASCIST AGGRESSION IN VIET NAM." Some servicemen were watching the demonstration. Lieutenant Howe was charged with, among other things, violating Article 88 of the Uniform Code of Military Justice which makes it unlawful for any commissioned officer to use contemptuous words against the President, the Vice President and certain other government officials. The Lieutenant was, for his sign-carrying activities, convicted by court-martial of a violation of Article 88. The conviction and sentence were approved by a Board of Review.[15] Howe then petitioned for review of his case by the Court of Military Appeals. His first assignment of error (and the only one pertinent to this subject) was that the charges against him violated the First Amendment to the United States Constitution.

After a lengthy review of the history of Article 88, the Court, speaking through Judge Kilday, held that the defense of violation of Howe's freedom of speech must fail. He clearly showed that the prime purpose of Article 88 was to aid in insuring the survival of civilian control over the military. The Court felt that to hold otherwise, would "inevitably inure to the advantage of the recalcitrant professional military man by providing an entering wedge for incipient mutiny and sedition."[16] So, we see that freedom of speech is limited, not only to directly uphold the discipline of the military service, but to insure the primacy of civilian control as well.

Next to be considered are two cases which involve both freedom of speech and freedom of the press. The first of these has to do with a

marine named Young Claude Gray.[17] On 17 October 1968, a letter was found in the rough log book of the crash crew to which Gray was assigned. On that same day, Gray was reported as AWOL. The Corporal who found the letter read it to those present at the time. Among other things, it stated that the United States Constitution was a farce, questioned why the readers of the letter should "eat [sic] hack and take these unjust rules and do nothing about it."[18] The letter closed with the words, "We want all right."[19] It was signed "Mr. Gray".[20] After returning to military control, Gray again went AWOL and along with another AWOL marine appeared at a church where an anti-war rally was taking place. The two disseminated a statement which they had prepared.[21] Gray was, because of the letter and the statement, charged with a violation of Article 134 of the Uniform Code of Military Justice. The charge was that the letter and the statement were uttered with a design to promote disaffection and disloyalty among the troops. He was convicted and the conviction was upheld by a board of review. On appeal before the Court of Military Appeals, one of the defenses was the contention that Gray's freedom of speech had been violated. In speaking to the issue, as it involved the letter, the Court made the following comment.

> Servicemen, like civilians, are entitled to the constitutional right of free speech. The right of free speech, however, is not absolute in either the civilian or military community. The point of curtailment of the right is not, and perhaps in most instances cannot be, delineated in template form. Some restrictions exist of necessity in the armed forces which have no counterpart in the civilian community. Speech disrespectful or contemptuous of a public official may be tolerable in the civilian community because it does not directly affect the official's capacity to discharge his public responsibilities . . . but similar speech by a subordinate toward a superior in the military can directly undermine the power of command; such speech, therefore, exceeds the limits of free speech that is allowable in the Armed Forces. [The Court here dis-

> masses other cases.] Suffice it to reaffirm the conclusion that the public making of a statement disloyal to the United States, with the intent to promote disloyalty and disaffection among persons in the armed forces and under circumstances to the prejudice of good order and discipline, is not speech protected by the First Amendment.[22]

The statement distributed at the anti-war rally was found not to be disloyal to the United States.[23]

Of somewhat similar import is the earlier case of United States v. Jenick and Stolte.[24] The two, enlisted men in the United States Army, composed, and reproduced (at the post library of the military installation where they were stationed) some two hundred leaflets. The leaflets were entitled, "We Protest". In discussing our involvement in Vietnam, the statement included the following sentiments:

> We protest the war in Vietnam. We know that war will never bring about peace. Peace can only be obtained through peaceful means. War cannot be rationalized, justified, or condoned. If you want to fight for peace, stop killing people. The greatest contribution America can make toward world peace is to become a peaceful nation. The communist paranoia that we presence does not justify what we are doing to the country of Vietnam and its people.[25]

The statement was signed by Jenick and Stolte and was distributed by them around the post. These activities resulted in charges being brought against them. They were convicted by general-court martial.

In answering the defense of denial of free speech, the Board of Review quoted the following from In Re Grimley.[26]

> An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, nor the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other.[27]

Recognizing the date of Grimley, the Board indicated that the revisions of military codes, which have been changed from time to time to meet criticisms of military justice, have nevertheless recognized the need to retain certain restrictions on the constitutional rights of servicemen. Continuing, the Board pointed out that

> The effectiveness of our military efforts in defense of our Nation demands curtailment of any deliberate efforts by military members to promote disloyalty or disaffection among our soldiers and the civilian populace. Appellants Amick and Stolbe contend that there is no clear and present danger or military necessity to justify the actions taken against them. We do not agree. We judicially note that the United States, in February of 1968, [the time of the offense] was engaged in armed conflict in Vietnam. From the record, we are convinced beyond reasonable doubt, that appellants' conduct at Fort Ord, a basic training center, was designed to undermine the war effort in Vietnam by organizing dissent among the very troops who would be deployed in fulfillment of the United States efforts in that country; appellants' conduct; we are satisfied to the necessary degree, presented a clear and present danger to maintaining the military discipline essential to an effective fighting force.[28]

The Board, in conclusion, found that, "appellants' course of conduct was such a threat and hence does not fall within the protection of the First Amendment of the Constitution of the United States."[29] The Board of Review affirmed the conviction and the Court of Military Appeals refused to review the case.[30]

The next two cases are somewhat different in that they deal with the right of free speech in the context of the wearing of the uniform.

The first of these cases involved Michael R. Locks and three others. Locks, an enlisted member of the United States Air Force, was convicted by general court-martial of twice disobeying the following general order issued by the Secretary of the Air Force.

> Recent developments have established a need for clarification of the circumstances in which Air Force members are not permitted to wear their uniforms. Accordingly, pursuant to para 1010d, AFM 35-10 26 June 1968, the Secretary of the Air Force has specified that Air Force members will not wear the uniform at any public meeting, demonstration, or interview if they have reason to know that a purpose of the meeting, demonstration or interview is the advocacy, expression of approval of opposition to the employment or use of the Armed Forces of the United States.[31]

At the trial, Locks had contended that this order was a violation of his freedom of speech under the First Amendment. When this contention was rejected by the law officer (military judge at courts-martial) and upon conviction, but before the completion of the military appellate process, Locks had petitioned the Federal District Court[32] for a Writ of Habeas Corpus claiming denial of free speech. The other Air Force enlisted men, who had not violated the order, wished to enter the case because they desired and intended to do what Locks had done, that is, violate the order by participating in peace demonstrations in uniform. The District Court refused to hear Locks' petition because it would be dealt with by military appellate review. But it agreed to hear the same freedom of speech issue as to the other three as this presented a unique "controversy" within the jurisdiction of the court.

In deciding against their contention, the Court said that,

> There is no constitutional right of a member of the Air Force to wear his uniform when and wherever he pleases. There can be no doubt that the Air Force may by proper orders regulate the use of the Air Force uniform by which individuals wearing that uniform are identified with the Air Force.[33]

But the question remained, was the enforcement in this type of situation a denial of First Amendment freedom? It has long been held that display of symbols can be speech, Stromberg v. California.[34] But the

Court held that the Secretary of the Air Force could control when the symbol be used.

> A military uniform is a symbol, and the issue in this case is whether it may be used in a context expressly contrary to the purposes and values intended by the Secretary of the Air Force. This court holds that if the Secretary of the Air Force commands that the uniform not be worn at events of the nature in question, the First Amendment does not compel otherwise. To permit members of the military to display at will the primary symbol of their military service would be to permit the destruction of the very symbolic effectiveness which the uniform is intended to enjoy. This court does not find it violative of the First Amendment for the Secretary to limit the wearing of the uniform to contexts that will promote a sense, not just of membership in the Air Force, but of participation, allegiance, and achievement.[35]

The Court drew on the Guns of August for the following comment:

> The power with which a uniform can symbolize the values of patriotism and military prowess was exemplified in France prior to World War I. For almost a century the French army had sported blue coats, a red kepi, and red trousers. As developments in technology enabled rifles to fire over greater distances, the need to escape visual detection increased. Efforts to change the uniform to a duller tone than red, however, were defeated by the assertion that "Le pantalon rouge c'est la France."[36]

In considering Locks' conviction (which the District Court had refused to review), the Board of Review, in affirming it, relied heavily on the District Court's opinion.[37] The Court of Military Appeals refused to review the Board's decision.[38]

Of similar import is United States v. Toomey.[39] Toomey was tried and convicted by general court-martial of violating an Air Force Regulation[40] by wearing the uniform at a protest rally in front of Selective Service Headquarters at Albuquerque, New Mexico. In speaking to the argument that the enforcement of the regulation under these circumstances violated Toomey's freedom of speech as guaranteed by the First Amendment,

the Board quoted at some length from Judge Latimer's concurring and dissenting opinion in United States v. Voorhees.[41]

> Undoubtedly, we should not deny to servicemen any right that can be given reasonably. But in measuring reasonableness, we should bear in mind that military units have one major purpose justifying their existence; to prepare themselves for war and to wage it successfully. That purpose must never be overlooked in weighing the conflicting interest between the right of the serviceman to express his views on any subject at any time and the right of the Government to prepare for and pursue a war to a successful conclusion. Embraced in success is sacrifice of life and personal liberties; secrecy of plans and movement of personnel; security; discipline and morale; and the faith of the public in the officers and men and the cause they represent.
>
> Time after time the Supreme Court of the United States has stated that the right to speak freely must be considered in the light of attending facts and circumstances . . . If such is the case, then the rights of the man in the service must be proportioned by a more refined measuring rod than are those belonging to the man in the street . . . The substantial interest of society with which we deal must be weighed on scales adjusted to the necessities of the military service.
>
> At the heart of every successful military force are morale, discipline, and public support of the cause. . . . . .
>
> I have a great deal of difficulty in following an argument that those who serve should be entitled to express their views, even though by so doing they may destroy the spirit and morale of others which are so vital to military preparedness and success . . . Assuming arguendo that the privilege of free speech is a preferred right, we should not prefer it to such an extent that we lose all other benefits of our form of government. A demoralized and undisciplined military service could cost us all those we possess.[42]

After setting that background, the Board then added the following:

> Applying these principles, it is unquestionable that the military services have the authority to regulate the wearing of their respective uniforms, and to prohibit the wearing of the uniform under inappropriate, service-demeaning circumstances. This, obviously, the provisions of paragraph 1-10, AFR 35-10C are designed and intended to accomplish. Nor can there be any doubt that the wearing of the uniform while participating in a demonstration protesting the Selective Service Act and its implementation, and advocating disobedience

> of its provisions, is highly injurious to the reputation of the military service. Worn in these circumstances, the uniform would be likely to attract much more attention and attribute greater significance to the purpose of the demonstration than would otherwise be the case, and, additionally, would amount to an overt and simultaneous protest against the military establishment by one of its members. We have no hesitancy in concluding that the wearing of the uniform under such service discrediting circumstances would not only be disruptive of morale and discipline in the armed forces, but would directly and effectively tend to undermine the faith of the public in the military establishment and its personnel.
>
> Accordingly, we find the limitations imposed on the accused's conduct by the directive allegedly violated, are constitutionally premised, reasonable, and based on military necessity.[43]

In stark contrast is the recent case of the civilian who wore the uniform of this country's armed forces at a rally protesting the Vietnam War.[44] Daniel Jay Schacht, a civilian, was convicted in Federal District Court of violating a federal statute,[45] which forbade any civilian from wearing the uniform of any branch of the Service. His conviction was affirmed by the United States Court of Appeals and he petitioned the Supreme Court for a review of his conviction. Schacht claimed that his wearing of the uniform, which was done while participating in a skit (in front of an induction center) in opposition to the Vietnam War, came within section 'f' of Section 772 the Statute which allowed civilians to wear the uniform while portraying a member of the Armed Forces in a a movie or play, "if the portrayal does not tend to discredit that armed forces." It was the Government's contention that the performance was not a "theatrical production within the meaning of section 'f'." The Court, speaking through Mr. Justice Black, held that it was such a production and went on to answer Schacht's contention that the requirement that the play or movie not discredit the armed forces was an unconstitutional

restraint on his freedom of speech in violation of the First Amendment. The Court agreed.

> It becomes clear that Congress has in effect made it a crime for an actor wearing a military uniform to say things during his performance critical of the conduct or policies of the Armed Forces. An actor, like everyone else in our country, enjoys a constitutional right to freedom of speech, including the right openly to criticize the Government during a dramatic performance. The last clause of Section 772 (f) denies this constitutional right to an actor who is wearing a military uniform by making it a crime for him to say things that tend to bring the military into disrespect and disrepute. In the present case Schacht was free to participate in any skit at the demonstration that praised the Army, but under the final clause of Section 772(f) he could be convicted of a federal offense if his portrayal attacked the Army instead of praising it. In light of our earlier finding that the skit in which Schacht participated was a "theatrical production" within the meaning of Section 772(f), it follows that his conviction can be sustained only if he can be punished for speaking out against the role of our Army and our country in Vietnam. Clearly punishment for this reason would be an abridgement of free speech. The final clause of Section 772(f), which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment.[46] (Emphasis mine)

The difference between the restrictions which the Government is at liberty to place on those in the armed forces when they are in uniform and on civilians whom it has permitted to wear the uniform is obvious.[47]

Disrespect Toward Military Superiors

The rules regarding the offense of disrespect toward one's superiors and the necessity of having recognized the person as one's superior remains unchanged,[48] although instances of this offense in the military appellate process appear to have declined. It is also still the law that an officer can step so far out of his role as to no longer be entitled to the protection of this limitation on freedom of speech. Al-

though not directly involving speech, United States v. Struckman[49] is illustrative of the fact that restrictions on personal action pertaining to respect of superior by subordinate are enforced only as long as they may be said to effectuate their purpose of bolstering discipline by such respect. Struckman was a Private in the United States Marine Corps. He was called to the office of his commanding officer and, in the ensuing series of events, the officer bullied him and finally asked the accused to tell him "what . . . he would like." Struckman replied that he would "like to see the Marine Corps flat on its back with its heels in the air." This angered the officer and he confronted Struckman and told him to see if he could put him on his back. Struckman obliged and hit the officer, resulting in his being charged and convicted by court-martial. The Court of Military Appeals overturned the conviction.

> To me, the evidence portrays a situation in which the commander, by words and action, abandoned his position and his rank. In consequence, the accused's response to the words and conduct "did not, as a matter of law, detract from the authority and person" of the commander, as a commander or as a commissioned officer. [Citing United States v. Noriega, 7 U.S.C.M.A. 196, 198, 21 C.M.R. 322 (1956).][50]

The Intervention of the Federal Courts

The era of Vietnam has seen virtually unprecedented intervention by the civilian Federal judiciary into the process of military justice. As in other substantive areas of the law, the freedoms of speech and press of those in military service have been the object of this intervention. It is beyond the scope of this inquiry to trace the history of the reviewability of military actions by the civilian judiciary.[51] What is of importance here is the fact that in those instances in which Federal

Courts have intervened, there are decisions both supporting and rejecting the military's handling of issues of freedom of speech and press. Two recent cases here supported the military. The first of these is Dash v. Commanding General, Fort Jackson, South Carolina.[52]

Dash and others challenged, as a violation of the First Amendment, the following post regulation:

> Distribution of publications such as books, periodicals, pamphlets, handbills, flyers, advertisements, and similar printed material at Fort Jackson may not be made except through regularly established and approved distribution outlets unless prior approval is obtained from the installation commander or his authorized representatives. Approved outlets are the Post Exchange and its branches, the Post library and the official offices and designated agencies of the installation. Individuals desiring to distribute unofficial publications of any kind within the reservation will submit copies to CI for approval by the Commanding General prior to effecting dissemination.[53]

After discussing the general issue of the applicability of First Amendment freedoms to those people in the military, the Court went on to state that,

> Despite the absence of any specific decisional authority on our specific issues, it would appear plain from the foregoing general principles that, within certain limits, the military establishment should have authority to restrict . . . the distribution of printed materials . . . . The right to restrict, however, must no doubt be kept within reasonable bounds; it is not, and cannot be, a completely limitless power. And, however hesitant they may be to "intrude," Courts will be available to determine whether there is reasonable basis for such restrictions as may be placed on the serviceman's right of free speech by the military establishment.[54]

The challenged regulation was considered in conjunction with implementing instructions from the post Judge Advocate which require that delay in distribution by the Post Commander be based on his decision that "the specific publication presents a clear danger to the loyalty, dis-

cipline, or morals of his troops."[55] Furthermore, these instructions stated that the fact that the publication is "critical--even unfairly critical--of Government policies or officials" is not of itself sufficient grounds to prohibit its distribution. The regulation had never been used to deny distribution of any publication. All that was challenged was the power to do so. The Court found that the power existed, subject to judicial determination (in an appropriate case), if the power had been properly exercised or improperly abused.

Of similar import is Kahr v. Resor[56] where the United States Court of Appeals refused to overturn a District Court decision refusing to issue a preliminary injunction against interference by the Commanding General at Fort Bragg, North Carolina, in the distribution of a serviceman's newspaper called "Bragg Briefs." The decision to deny distribution rights was based on the same criteria as set out in Dash.[57] However, the Court returned the case to the District Court with instructions for that court to determine, on the merits, whether the Commanding General had acted properly under the guidelines. The upshot of all this appears to be that the guidelines were acceptable, but that they must be fairly applied.

In a different factual setting, the Army was not so fortunate. This was Cortright v. Resor,[58] where action by the Army, deemed by the Court to violate free speech, was overturned. The Army was, by writ of mandamus, ordered to return Cortright to the post from which he had been transferred, because the transfer was found to be a direct result of his anti-war activities. There was no other valid reason for the transfer. Such action, by the Army, was found to be a denial of Cortright's freedom of speech.

The Freedoms of Petition and Assembly

The Wolfson case[59] is illustrative of the fact that there is great latitude given a member of the military to singly petition for redress of grievances. Captain Wolfson, a doctor serving a two year tour of active duty in the Army, had a number of grievances which he was not reluctant to express. These included the fact that he, a captain, had been ordered to serve in a major's duty slot in Soc Trang, Republic of Vietnam, while higher ranking Regular Army medical personnel remained outside of Vietnam. He was also upset because he felt that his talents as a surgeon were not required at his duty station and that the medical supplies there were inadequate. He did not hesitate to express these and other complaints to General William C. Westmoreland, commanding the United States' forces in Vietnam, when the latter visited the Soc Trang Dispensary. Other personnel were present during this incident. The result was that charges were preferred against Captain Wolfson under Article 133 of the Uniform Code of Military Justice (conduct unbecoming an officer). He was convicted by general court-martial. The Board of Review reversed the conviction.

> Dr. Wolfson's complaints to General Westmoreland are not actionable, irrespective of whether the complaint was justified or not. It, of course, would be an empty right if military personnel had to gamble whether the complaint was proper under the circumstances and subject themselves to punitive action should the complaint be ultimately considered unjustified.[60]

Participation, however, in a peaceable assembly, even if its purpose is to petition the Government for a redress of real or imagined grievances is still strictly limited in the Military. Illustrative of this is United States v. Harvey.[61] Harvey was found by the Board of Review to have attempted to persuade other marines to join him in "re-

questing court," as a group, for the purpose of refusing to go to Vietnam. "Mast" is a procedure established under Article 138 of the Uniform Code of Military Justice (complaints) whereby marines could communicate their grievances to their commanding officer. The Board clearly distinguished that which the evidence indicated Harvey was trying to do from permissible airing of grievances.

> In our opinion such conduct poses a most grave threat against the discipline of the Armed Forces. Applying "the clear and present danger test" we do not encounter difficulty in concluding that the statements made by the appellant in the factual setting of the instant case are so imminently dangerous to the discipline in our armed forces as to warrant or justify a reasonable limitation on speech based on military necessity.[62]

A Federal Court has also intervened and expressed its view on the serviceman's freedom of assembly.[63] The Commanding General had refused to allow a public meeting, on post, for the purpose of discussing Vietnam. At an earlier, unauthorized meeting, discipline had, for a time, totally broken down. The Federal District Judge supported the Army's position.

> Can it be disputed that such a meeting, held on post and directed particularly at servicemen being trained to participate in that very war, would likely be calculated to breed discontent and weaken loyalty among such servicemen? Can training for participation in a war be carried on simultaneously with lectures on the immorality or injustice of such war? In my opinion, the denial of the right for open public meetings at advertised meetings on post for discussion of the propriety of the political decision to participate in the Vietnam War was justified "by military necessity" and represented an infringement of the constitutional rights of the plaintiffs or others similarly situated.[64]

The Freedom of Religion

Compulsory Attendance at Religious Exercises

There is no evidence of any existence of the practice of requiring

them in the military to attend exercises of Divine Worship. However, as pointed out by Major LeRoy F. Foreman, Judge Advocate General Corps, United States Army, in a recent article,[65] there are other activities at which compulsory attendance may pose a problem. These he lists are: (1) character guidance classes, (2) chapel attendance at the Military Academies, (3) religious counciling, and (4) memorial or patriotic services.

In the matter of character guidance, Major Foreman believes that "Assuming that character guidance training falls within the general classification of religious exercise, serious problems arise when the content is prescribed and attendance is mandatory."[66] After citing civil-court cases which, by analogy, might pose problems for the military, and discussing the utility of trying to characterize the guidance sessions as "moralistic" rather than "religious," the possibility of a justification for them is suggested. "On the other hand, it is possible that character guidance training can be justified on the same basis as the chaplaincy itself: the need for some substitute for parental and community influences which would ordinarily influence the character development of young soldiers, plus the necessity for creating a strong moral and patriotic disposition in soldiers in order to enable them to perform under the terrifying and strenuous conditions of mortal combat."[67] Nevertheless, the possible religious nature of the training, the problem of the classes being taught by uniformed chaplains, leads the author to conclude that "character guidance training as currently utilized by the Army is in serious danger of being overturned by an adverse court decision."[68]

The problem of mandatory chapel attendance at the Military Academies

was considered by a Federal District Court in 1970.[69] The Court upheld the mandatory requirements, but apparently on the basis of "the non-religious, curriculum-based nature of the program."[70] But, as Major Foreman points out, "whether the Anderson decision will be the final word in the field remains to be seen."[71]

The religious counseling referred to by Foreman is in the area of marriage counseling. This issue was actually decided by the Court of Military Appeals in 1961.[72] There, the Court ruled that marriage counseling by chaplains of servicemen overseas prior to the latters' marriage to local nationals was not a violation of the First Amendment. In part, the rationale of the Court was a familiar one. "Although not specifically stated as a ground for its decision, the court dwelt at length on the reasonableness of the regulation and the valid military purpose served by maintaining morale among young soldiers away from home for the first time in many cases and unaccustomed to the social mores of a foreign land."[73]

In the matter of memorial or patriotic services, Foreman points out the differences and similarity to the school prayer cases. The main point seemed to be that, in theory, such services were not religious, but military in nature.[74]

Other Restraints on Free Exercise of Religion

A continuing problem for the military has been the serviceman who, for religious reasons, is opposed to medical treatment. In the typical case, this person refuses a direct order to submit to the treatment and is then punished for refusing to obey the order. This was the situation in United States v. Chadwell and Fletcher.[75] The two accused, both of

whom had developed religious scruples against medical treatment after enlisting in the Marine Corps, refused direct orders to submit to inoculation against certain diseases. In affirming their conviction, the Board of Review stated that the accused "assumed an impossible position so far as the military was concerned."[76] The Board continued, "we must conclude on the basis of common knowledge that an order to take immunization shots is legal and necessary in order to protect the health and welfare of the military community and that failure to take such shots would represent a substantial threat to public health and safety in the military."[77]

In United States v. Barry,[78] it was held that religious belief was not a defense to a charge of refusing to obey an order to perform military duties on Saturday, the day of rest in accused's religion.

> To the extent that a military man's freedom of conduct in practicing his religion is curtailed by the demand that he obey proper orders, that curtailment is a permissible result of the operation of a government under law. We hold that the accused had no legal right or privilege under the First Amendment to refuse obedience to the order, and that the order was not given for an illegal purpose.[79]

The problem of a conflict between uniform regulations and a person's religious beliefs was considered by Major Foreman.[80] After pointing out that the Judge Advocate General of the Army has held that "the soldier's desire for exterior manifestation of his religion may be subordinated to the commander's responsibility for insuring the neat and soldierly appearance of his troops,"[81] the matter of beards was considered. Sikhs are the only religious sect permitted to wear beards, a Black Muslim having been ordered to shave his in spite of the fact that it might have religious significance. The reason for the distinction is that a Sikh is forbidden by his religion to cut his hair, while in other

religions, the beard is merely "commemorative."[82]

Access to Chaplains

Lastly, under the category of the free exercise of religion is the matter of access to chaplains. Earlier, the comment was made that, given the nature of the military community, there would be instances in which members of various religious sects, especially the smaller ones, would not have access to a chaplain, or other man of the cloth of their own particular faith. It was suggested that, given the unique circumstances of the military, all that was possible was being done. That comment still holds. The problem of access was, however, the subject of recent litigation in the Federal courts.[83] There, the Court held that it was without authority to "review administrative orders of commanding officers of Navy and Marine Corps bases which excluded three civilian ministers from the respective bases, even though such exclusion might deprive military prisoners of services of the ministers as ministers of their choice."[84]

This concludes the tracing of the United States military's experience with the First Amendment freedoms. The Sixth and final chapter will summarize and present conclusions.

CHAPTER VI

SUMMATION AND FINDINGS

The Historical Evidence

From the beginning of the United States' experience with a military establishment, the vital necessity of discipline within that establishment has been recognized. In 1776, John Adams was convinced that only resort to the most vigorous military discipline that historical example could provide, that of the Romans and the British, could stave off the utter defeat of the Continental Army and the resulting ruin of the dream of independence. This view has persisted among many thoughtful citizens. In 1955, Judge George Latimer of the United States Court of Military Appeals expressed the opinion that "A demoralized and undisciplined military service could cost us all those [benefits of a democratic form of government] we possess."[1]

This point of view has not been the only one. There has always existed a reluctance to restrict the freedom of the military in the interest of discipline. John Adams complained that articles of war with "the least severity" or "the least tendency to a necessary discipline" would meet with as much opposition in the Continental Congress "as if it were the most perfect."[2] This attitude he attributed to the "undigested notions of liberty prevalent among the majority of members most zealously attached to the public cause."[3] The recent attacks on military

disciplina from a number of sources reflect the same clash of philosophy.

The average American in uniform, be it buff and blue or jungle fatigues, has always been reluctant to accept restrictions on his personal freedom. General Richard Montgomery described this reluctance when he wrote about troops under his command who carried "the spirit of liberty into the field."[4] General officers have proven to be no exceptions, as the relief from command of George Patton and Douglas MacArthur will bear witness.

Limitations on the First Amendment freedoms of speech, press, petition and assembly have shown themselves to be important in the quest for discipline of the military. These same freedoms have been most zealously protected by those in opposition to strict curtailment of the personal freedoms of the military. The limits on these freedoms can, for the most part, be traced, unbroken, from the American Revolution to the present Uniform Code of Military Justice. Freedom of religion has, to a certain extent, been curtailed in the interest of the well-being of the military, although not in a strictly disciplinary sense.

The Freedoms of Speech and Press

The ways in which limitations have been placed on these two freedoms have followed a very definite pattern. Men and women in the military were not allowed to show contempt or disrespect for either the United States' institutions of government (including certain officers thereof) or their military superiors. Nor were they allowed to disturb the internal harmony of military society by addressing another military person in a manner that would tend to provoke trouble either by angering the other person, or persuading him to desert or mutiny. Finally, one

in the military would not engage in verbal or written conduct which would cause the civilian populace to lose respect for the military, or which, in any other way, would be detrimental to the military. These themes may be seen in these limitations. First, there is the need to maintain the primacy of civilian control over the military establishment. Second, and in practice by far the most important, is the necessity for internal discipline. Last, is the thought that the civilian populace should have confidence in its armed forces.

The primacy of civilian control

The rules laid down to insure this primacy by curbing the freedoms of speech and press are principally Articles 88 (disrespect, by officers, toward certain governmental institutions and officials) and 134 (the general article) of the Uniform Code of Military Justice and the earlier counterparts (where they existed) in the Articles of War and the Articles for the Government of the Navy.[5] These restrictions have been in force from the American Revolution to the present; from the Continental soldier who drank a health to the King of England, to Lieutenant Howe who carried a sign describing Lyndon Johnson as a Fascist. Civilian control was also at issue in Harry Truman's decision to relieve Douglas MacArthur from command.

Internal military discipline

The maintenance of discipline encompasses all of the above mentioned limitations placed on speech and press, expressions of contempt for governmental officials as well as disrespect for one's military superiors. Thus, a World War II Infantry captain could be prosecuted for extolling Germany over the United States, primarily in the interest of internal

discipline. The statements were felt to be detrimental to the respect due him from those under his command, a matter of internal discipline.

The same consideration underpins the requirements that the subordinate respect the superior. "The disrespectful behavior contemplated by Article 89 [disrespect to superior officers] of the Code, . . . is such as distracts from the respect due the authority and person of the superior officer."[6]

Apart from the superior, subordinate relationship, but similar thereto, is the matter of disloyal statements and their effect on discipline. Thus, "It follows that such statements [that excite discontent against the United States] by their very words promote disloyalty by and disaffection among members of the armed forces and, accordingly, are disloyal to the United States."[7]

Two other types of cases remain to be considered under the general category of military discipline, although they could nearly as well be considered in connection with the primacy of civilian control or the respect of the civilian community. The first of these is the military person of high rank who, by speech or press, actively interjects himself into political controversy. Consideration of such activity as a sin is a fairly recent occurrence, stemming in all likelihood from the professionalization of the Army and Navy during their "years of isolation."[8] Thus, while General Winfield Scott could, with virtual impunity, vocally involve himself in the political issues of his day, to include seeking public office, Generals Patton and Walker were relieved of their respective commands for acts which must surely be considered no more political than Scott's. In all fairness, it must be said that Patton's utterances were of almost childlike innocence, while Walker

knowingly engaged himself in the political indoctrination of those under his command, an act fraught with the gravest perils, both for internal discipline and the primacy of civilian control.

The other type in public criticism by a military officer of the policy positions of his civilian and military superiors. This was the sin of Mitchell, MacArthur and Rickover. The key here seems to be the way the criticism is accomplished. Mitchell and MacArthur ended up losers, basically because of the vehemence of their attacks on policies they disagreed with. Even MacArthur, in defending Mitchell's (and his own) right to speak out on policy matters condemned the violence of Mitchell's language. Rickover was much more circumspect in his battles with the flag rank proponents of the aircraft carrier. Parenthetically, it may be said that Rickover, who was probably right, even as Mitchell has proved to have been, had the benefit of the public (and especially Congressional) recollection of the treatment accorded the advocate of air power.

Civilian respect for the military establishment

An area of unusual sensitivity in this regard is the wearing of the uniform. Thus, the Board of Review in United States v. Toomey[9] could find that not only might Toomey's wearing of the uniform at an anti-war demonstration undermine the internal discipline and morale of the military, "but would directly and effectively tend to undermine the faith of the public in the military establishment and its personnel."[10]

The Freedoms of Petition and Assembly

Petition

The armed forces have always provided channels for the expression of complaints by military personnel. Often, however, these have been little more than unworkable embellishments in the Articles of War and Navy Regulations. For example, it is difficult to imagine an Eighteenth or Nineteenth Century naval captain, steeped in the idea that iron discipline is the only course open, upholding the complaint of an ordinary seaman against one of the ship's petty officers. These petty officers were the keys to discipline and it would have been a rare captain who would not have upheld their authority. And, as Winthrop pointed out, the two Articles of War that chiefly dealt with grievance procedures were virtual dead letters by the beginning of the War Between the States.[11] So dead were they apparently considered to be, that Federal District Judge Weinstein could describe Article 138 of the Uniform Code of Military Justice (complaints of wrongs), a direct descendant of comparable provisions in the Articles of War and Navy Regulations, as "relatively new."[12]

Assembly

Although the military recognized the right of those in its service to complain, the complaints have always been required to be individual and not in combination with others, even though all had the same grievances. Any other policy, it was felt, would have been to encourage mutiny and insubordination. So assemblies, even peaceful ones, with the purpose of seeking redress of grievances have customarily been forbidden, whether by Andrew Jackson resorting to "court-martial and firing party" or a ban (subsequently approved by a Federal district judge) by

the Army on an on-post public meeting to discuss the Vietnam War.

The Freedom of Religion

The First Amendment prescribes any establishment of religion or prohibition on the free exercise of religion. It is the latter that has caused numerous problems for the military from the beginning, and the solutions to these problems have been a long time in coming. The establishment issue has been raised but infrequently, usually by disgruntled religious-pacifist organizations, displeased over the fact that all men of the cloth do not subscribe to their philosophy about war. The free exercise problems have taken both positive and negative forms. In the former category, fall such matters as compulsory attendance at worship services and other functions that in some sense are of a religious nature, requirements that one work on the "day of rest" set aside by his religion, and mandatory medical treatment in contravention of religious beliefs. The negative aspect of the establishment problem centers around the problems of assuring that servicemen have access to a clergyman, priest or rabbi of their own particular faith, or from one whose views are acceptable. This problem has been the object of much effort with the result that great improvement has been witnessed, especially since World War I.

Conclusion and Opinion

The Freedoms of Speech and Press

It is apparently a matter of almost unanimous recognition that, because of the unique status of military society, its members surrender some of their civil rights, including, to an extent, those generally pro-

tected by the First Amendment. What is not so often recognized is that here the military differs only in degree, for even in the case of the civilian, the only absolute freedom is that of thought. The differences arise as to how much greater should the restrictions on the military's First Amendment freedoms be than on those of the civilian community. Both history and common sense clearly indicate not only that such restrictions on military personnel should be considerably greater, but indicate as well, the areas in which these greater restrictions should apply.

Of consistent importance from 1775 to the present, public manifestations of respect for superior by subordinate are vital. Without such indicia of respect, a military organization runs a great risk of becoming a mob. Mobs seldom win in combat, unless it be with another mob. As Judge Latimer of the Court of Military Appeals has expressed it, "if every member of the service was, during a time of conflict, or preparation therefor, permitted to ridicule, deride, deprecate, and destroy the character of those chosen to lead the armed forces, and the cause for which this country was fighting, then the war effort would almost surely fail."[13] But this type of restriction is not really where the problem lies. As one writer has recently stated, "It may be generally concluded that in most cases there is little danger that the applicaties of traditional military sanctions will infringe on the freedoms of speech of those in military service."[14] The author of the article cites Articles 88, 133, and 134 as presenting the most danger.[15]

It is Article 88 and the whole scope of critical political comment that has raised the greatest outcry against the military restrictions on the freedoms of speech and press. One author has concluded that Article 88 should be narrowed so as to "exclude specifically all utter-

ances but those published or made at public gatherings, or those made not in ordinary conversation but in an unsolicited effort to proselytize military personnel.[16] While granting that not all critical comment about the Government or its policies should be denied to persons in military service, surely the problem that such speech has an internal military discipline should be kept in mind. Even solicited comments from an officer to a member of his command could create problems. It is submitted that the line between what is permissible and what is not will have to be drawn by judicial decision, hopefully within the military justice system, but if not, then by the Title III Courts. In drawing this line, the statement of an Army board of review should always be kept in mind. "The effectiveness of our military efforts in defense of our nation demand curtailment of any deliberate efforts by military members to promote disloyalty or disaffection among our soldiers and the civilian populace."[17]

The Freedoms of Petition and Assembly

Much the same considerations must apply as regards the combined exercise of these two First Amendment freedoms. Thus, a Federal Judge in refusing to enjoin a ban at Fort Jackson on a public meeting on post to discuss the Vietnam War, stated, "Can it be disputed that such a meeting, held on post and directed particularly at servicemen being trained to participate in that very war, would likely be calculated to breed discontent and weaken loyalty among such servicemen?"[18]

Given the very necessary stringent limits on assembly, the military's internal grievance procedure needs to be made to work. If it had been put to use in the Cortright case, it is a possibility that the

Federal District Court would not have found it necessary to intervene in what was basically a problem in military discipline.[19] Military personnel have always had the right to gripe to the Congress and now, apparently, they have access to Title III Courts. If the military is to keep its personnel's complaints "within the family," the grievance procedure must be workable and meaningful.

The Freedom of Religion

The armed forces have gone a long way toward seeing that those in service have the same right of free exercise of religion as those in the civilian community. And, although taking a long time, it has done so under much more difficult circumstances. To do so, it has had to fight the "establishment" battle in order to keep its chaplains. While a few problems remain to be solved, those in the military enjoy an almost full measure of freedom of religion.

NOTES

Introduction

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4 Id. at 445.

5 Earl Warren, "The Bill of Rights and the Military," 37 New York University Law Review 181 (1962) at 186.

6 Id.

7 Louisville Gas Company v. Coleman 277 U.S. 322 (1928) at 41.

8 United States v. MacIntosh, 283 U.S. 605 (1931) at 623-24. I am not aware of any change in this law, but see the views expressed in Brahms, "They Step to a Different Drummer," 47 Military Law Review 4 (1970).

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2 Dudley W. Knox, A History of the United States Navy 7 (1936).

3 Second Continental Congress, 1775, Journal 111-12 (June 30, 1775).

4 Emory Upton, The Military Policy of the United States 16 (1917).

5 1 William Winthrop, Military Law 11-12 (1886).

6 Journal, supra note 3, at 112.

7 Id.

8 Id. at 113.

9 Id.

10 Id. at 114.

11 Id. at 116. This says volumes about the quality of food and equipment and about the service of supply.

12 Id. at 112.

13 Id. at 114.

14 Id.

15 Id. at 115.

16 The Military Policy of the United States, supra. note 4, at 9.

17 Benson J. Lossing, The Life and Times of Philip Schuyler 427 (1872-73).

18 5 The Writings of George Washington 369 (J C. Fitzpatrick, ed. 1932).

19 Id.

20 Allen Bowman, The Morale of the American Revolutionary Army 29 (1943).

21 4 The Writings of George Washington, supra note 18, at 180-81 (1931).

22 Id., at 28.

23 Id. at 107-08.

24 5 Id. at 32.

25 4 Id. at 65.

26 5 Id. at 43.

27 Second Continental Congress, 1775. Journal 281-82 (November 28, 1775).

28 Id. at 378.

29 Id.

30 Id. at 382.

31 Id.

32 Id. at 376.

33 C.O. Paullin, The Navy of the American Revolution 46 (1906)

34 3 Sparks, Writings of Washington 278-81 (1834).

35 3 C.F. Adams, The Works of John Adams 68 (1851).

36 1 Military Law, supra note 5, at 12.

37 Id.

38 3 The Works of John Adams, supra. note 35, at 68.

39 Id.

40 Id. at 83.

41 C.K. Bolton, The Private Soldier Under Washington 128 (1902).

42 3 The Works of John Adams, supra. note 35, at 68.

43 Id.

44 Id.

45 Id.

46 Id. at 83.

47 Id. at 68

48 1 Military Law, supra note 5, at 23

49 Second Continental Congress, 1776, Journal 789 (September 20, 1776).

50 Id.

51 2 Letters of Members of the Continental Congress 106 (E.C. Burnett, ed. 1923).

52 1 Military Law, supra. note 5, at 13-13.

53 3 The Works of John Adams, supra. note 35, at 69.

54 The Morals of the American Revolutionary Army, supra. note 20, at 29.

55 Id

56 16 The Writings of George Washington, supra. note 18, at 234-35 (1937).

57 The Military Policy of the United States, supra. note 4, at 62.

58 18 The Writings of George Washington, supra note 18, at 142 (1937).

59 The Military Policy of the United States, supra note 4, at 53.

60 Id. at 55.

61 Noah Brooks, Henry Knox, Soldier of the Revolution 140-41 (1900). But see Military Policy of the United States, supra note 4, at 64, for a different version of this mutiny. The weight of authority seems to support the Brooks account.

62 26 The Writings of George Washington, supra. note 18 at 372 (1938).

63 5 Id. at 32-33.

64 American Military History, supra. note 1, at 101.

65 2 Military Law, supra. note 5, at 93-97.

66 Id. at 98.

67 Id. at 108.

68 Id. at 98-111.

69 1 Id. at 619.

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71 1 United States Congress, American State Papers, Military Affairs 173 (1832).

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73 Id.

74 In 1797, the crew of H.M.S. Hermione mutinied, killed the captain and several others and turned the vessel over to the Spanish.

75 Naval Documents, supra, note 72, at 178-79.

76 Id. at 261.

77 Id. at 203-04.

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79 Id. at 219.

80 6 Id. at 232 (1944).

81 1 Glen Tucker, Poltroons and Patriots 151 (1954).

82 The Military Policy of the United States, supra, note 4, at 99.

83 Id. at 104.

84 Dwight L. Clarke, Stephen Watts Kearny 11 (1961).

85 1 Augustus C. Buell, History of Andrew Jackson 264 (1904).

86 Id. at 264-65.

87 Id. at 300.

88 Id.

89 Id. at 300-01.

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91 Id. at 81-82.

92 George Ballentine, Autobiography of an English Soldier in the United States Army 18 (1853).

93 Crenshaw Army Life on the Western Frontier 107-33 (F.P. Prucha, ed. 1958).

94 2 W. Scott, Memoirs of Lieutenant General Scott 361 (1864).

95 Id. at 364.

96 1 United States Congress, American State Papers, Naval Affairs 470-71 (1834).

97 Id. at 473-79.

98 7 American State Papers, Military Affairs, supra, note 76, at 452 (1861).

99 1 Memoirs of Lieutenant General Scott, supra note 94, at 245.

100 Charles W. Elliot, Winfield Scott, the Soldier and the Man, 367-83 (1937). Scott was, in 1852, actually nominated for President by the Whig Party. He unsuccessfully campaigned for the office without, apparently, having relinquished his association with the Army. See pages 614-646 of Elliot.

101 3 American State Papers, Military Affairs, supra note 76, at 166 (1860).

102 5 Id. at 16-17 (1860).

103 Id. at 17-18.

104 Id. at 253-54.

105 6 Id. at 588 (1861).

106 1 American State Papers, Naval Affairs, supra. note 96, at 454-55.

107 Id. at 453-54.

108 Id. at 496-500.

109 Id. at 500-01.

110 Id. at 502-03.

111 3 Id. at 87-88.

112 Id. at 131-33.

113 Id. at 239-41

114 6 American State Papers, Military Affairs, supra. note 76, at 119-20 (1861).

115 Id. at 149-48.

116 Remyrae, Reminiscenses of the Second Seminole War, supra. note 94, at 54.

117 Autobiography of an English Soldier in the United States Army, supra. note 97, at 46-47.

118 1 Department of the Navy, The History of the Chaplain Corps, United States Navy 100 (1950).

119 4 American State Papers, Naval Affairs, supra, note 96, at 413.

120 1 Department of the Air Force, Air Force Chaplains 8 (1961).

121 1 The History of the Chaplains Corps, United States Navy, supra, note 118 at 122.

122 Id. at 100.

123 Edward L. Nichols, Zach Taylor's Little Army 115-16 (1963).

NOTES

Chapter II

1 Samuel P. Huntington, The Soldier and the State 226-69 (1957).

2 1 William Winthrop, Military Law 14 (1886).

3 There was no article specifically directed at freedom of the press. Excluded from this study from this point on are those articles that forbade the issuance of a challenge to duel, the "upbraiding" of one who refused a challenge and the article that established the decorum in the presence of a court-martial.

4 2 Id. at 98.

5 Id. It is of interest to note that the word "contemptuous" was substituted for the word "traiterous" which had been used in the earlier versions of the Articles. The reason for this would seem to be the strict requirements necessary for treason to exist under the Constitution as opposed to the British practice of constructive treason.

6 Id.

7 Id. 99.

8 Id. at 101.

9 Id.

10 Id. at 108.

11 Id. at 110-11.

12 Senate Document No. 298, 67th Cong., 2d Sess. 984 (1922).

13 Id. at 979.

14 Id. at 984

15 Id. at 979.

16 Id. at 985.

17 Id.

18 Id. at 996.

19 Bell Irvin Wiley, The Life of Billy Yank 198 (1952).

20 Id. at 199.

21 Soldier Life in the Union and Confederate Armies 102-03 (Philip Van Doren Stern ed. 1961).

22 A.M. Goodloe, Confederate Echoes 176-77 (1907).

23 I. Herman, Memoirs of a Confederate Veteran, 1861-5 88-93 (1911).

24 Quoted in 1 Fred Albert Shannon, The Organization and Administration of the Union Army 1861-1865 166 (1928).

25 3 S.F. DuPont, Civil War Letters 230 (H.D. Hayes ed. 1969).

26 2 Id. 265-66 and 421.

27 1 Military Law, supra, note 2, at 803.

28 Id.

29 War Department, A Digest of the Opinions of the Judge Advocate General of the Army 120-21 (1912).

30 Id.

31 1 Military Law, supra, note 2, at 804.

32 The Life of Billy Yank, supra note 19, at 248.

33 Harold D. Langley, Social Reform in the United States Navy, 1798-1862 279 (1967).

34 1 Military Law, supra, note 2, at 936.

35 A few cases of giving challenges were found.

36 1 Military Law, supra note 2, at 1025.

37 Id. Article 83; one case for 1861 and one case for 1862.

38 Id. at 1045. Article 99; one case in 1863.

39 Id. Article 99; three cases in 1863 and one case in 1865.

40 Id. at 1046. Article 99; date of incident not established. The court-martial occurred in 1865.

41 Id. Article 99; one case in 1861.

42 Id. at 1045. One case, 1863.

43 2 Id. at 102-3.

44 Id. at 103.

45 Id. at 102.

46 Hearings on H R. 2498, Before a Subcomm. of the House Comm on the Armed Services, 81st Cong., 1st Sess. 1237 (1949).

47 2 Military Law, supra. note 2, at 99.

48 Id.

49 Senate Document No. 238, supra. note 12, at 979.

50 Id.

51 1 Military Law, supra. note 2, at 854 and 856

52 Id. at 861-62

53 Id. 821.

54 Id. 822-23.

55 1 S.F. DuPont, Civil War Letters, supra. note 25, at 413-14.

56 2 Id. at 192.

57 2 Military Law, supra. note 2, at 98.

58 1 Id. at 938-39.

59 Senate Document No. 238, supra. note 12, at 979.

60 Id.

61 1 The Organization and Administration of the Union Army 1861-1865, supra. note 28, at 228-29.

62 The Life of Billy Yank, supra. note 19, at 270.

63 Id

64 1 Department of the Air Force, Air Force Chaplains 7 (1961).

65 The Life of Billy Yank, supra. note 19, at 263.

66 Id. 264-66.

67 1 Air Force Chaplains, supra note 64, at 8

68 The Life of Billy Yank, supra. note 19, at 264.

69 1 Navy Department, History of the Chaplain Corps, United States Navy 95 (1950)

70 Id. at 122.

71 Id.

72 The Soldier and the State, supra note 1, at 226.

73 Id. 227-28.

74 2 Military Law, supra note 2, at 112.

75 See supra notes 4 through 11.

76 2 Military Law, supra. note 2, at 112-113.

77 Wilbur S. Nye, Plains Indian Raiders 39 (1968).

78 Id. 151.

79 H.R. Document No. 141, Forty-eighth Cong., 1st sess 68-69 (1883-84).

80 Id. at 52.

81 Id.

82 Id. 53.

83 1 Military Law, supra. note 2, at 1050.

84 The figures on convictions are as follows:

Fiscal Year 1912

Article 20, one officer and 111 enlisted men;
Article 62, (disrespect or insulting language to a commissioned officer) 299 enlisted men.
Article 62, (disrespect or insulting language to a non-commissioned officer) 2,465 enlisted men.
Article 62, (disrespect or insulting language to a sentinel) 125 enlisted men.
(1 War Department, Annual Reports, 1912 490 (1913))

Fiscal Year 1914

Article 20, 45 enlisted men.
Article 62, (disrespect or insulting language to a commissioned officer) 564 enlisted men.
Article 62, (disrespect or insulting language to a non-commissioned officer) 2,400 enlisted men including 27 marines serving with the Army.
Article 62, (disrespect or insulting language to a sentinel) 149 enlisted men including 4 marines serving with the Army.
(1 War Department, Annual Reports, 1914 225 (1914))

Fiscal Year 1916

Article 20, 70 enlisted men including one member of the militia.
Article 61, (impugning the professional conduct of a superior officer) one officer.
Article 62, (disrespectful or insulting language to a commissioned officer) one officer and 279 enlisted men including two members of the militia.
Article 62, (disrespectful or insulting language to a non-commissioned officer) 2,528 enlisted men including three members of the militia.
Article 62, (disrespectful or insulting language to a sentinel) 175 enlisted men including one member of the militia.
(1 War Department, Annual Reports, 1916 319 (1916))

85 1 Annual Reports, 1912, supra. note 84, at 430.

86 1 Annual Reports, 1914, supra. note 84, at 226.

87 1 Annual Reports, 1916, supra. note 84, at 320-21.

88 Department of the Army, A Digest of Opinions of the Judge Advocates General of the Army 144 (1912)

89 Id.

90 1 Military Law, supra. note 2, at 1050.

91 Id. at 1045.

92 A Digest of Opinions of the Judge Advocate General of the Army, supra. note 88, at 148.

93 Virginia W. Johnson, The Unreinstated General 350 (1962).

94 Navy Department, Annual Reports of the Navy Department, 1910 153 (1910).

95 Id. at 49.

96 The figures are much the same through the Annual Reports of 1916. For the exact breakdown, the reader is referred to these reports.

97 2 Military Law, supra. note 2, at 114-17.

98 1 Id. at 854 and 856.

99 A Digest of Opinions of the Judge Advocate General of the Army, supra. note 88, at 125.

100 Id. at 125-26.

101 Id. at 126.

102 Id. at 148.

103 Supra, note 176

104 H.R. Document No. 141, supra. note 79, at 158-67 See Appendix A for the complete series of letters.

105 Annual Report of the Secretary of War, 1912, supra. note 84, at 490-91.

106 Annual Report of the Secretary of War, 1914, supra. note 84, at 224-26.

107 Annual Report of the Secretary of War, 1916, supra. note 84, at 319-21. The report lists both violations as Article 23, but one is described as mutiny which is covered by Article 22.

108 Navy Department, Annual Report of the Navy Department, 1911, 167 (1912).

109 2 Military Law, supra. note 2, at 117.

110 A Digest of Opinion of the Judge Advocates General of the Army, supra. note 88, at 131.

111 Navy Department, Annual Report of the Navy Department, 1913, 20-21 (1914).

112 Navy Department, Annual Report of the Navy Department, 1914, 40 (1915).

113 Jack D. Foner, The United States Soldier Between Two Wars, 28-29 (1970).

114 The United States Soldier Between Two Wars, supra. note 113, at 132.

115 Id.

116 Id.

117 Id.

118 See supra. note 71

119 Air Force Chaplains, supra. note 64, at 10-11.

120 War Department Annual Reports, 1912, supra. note 84, **at 491.**

121 War Department Annual Reports, 1914, supra. note 84, at 225.

122 War Department Annual Reports, 1916, supra. note 84, **at 320.**

123 A Digest of Opinions of the Judge Advocates General of the Army, supra. note 88, at 122.

NOTES

Chapter III

1 Although the United States was only actively involved for two years, 1917 and 1918, the fact that the reports utilized are on a fiscal year basis will necessitate consideration of parts of 1916 and 1919.

2 War Department, Military Laws of the United States, 1921 145 (1921).

3 Id.

4 Id. at 1486.

5 Id. at 1482-83.

6 See, supra Chapter II, note 84.

7 Military Laws of the United States, 1921, supra note 2, at 1482.

8 Id.

9 See, supra, Chapter II, note 84.

10 2 Military Laws of the United States, 1921, supra, note 2, at 1481-1496.

11 Senate Document No. 238, 67th Cong., 2d Sess. 984-996 (1922).

12 15 Department of the Army, United States Army in the World War, 1917-1919, Reports of Commander-in-Chief, A.E.F. Staff Sections and Services 350 (1948).

13 Id.

14 2 John J. Pershing, My Experiences in the World War 97 (1931).

15 Id.

16 Fiscal Year 1917

Article 59, one officer, one Regular Army enlisted man and six National Guard enlisted men.

Article 62, (probably should be 63) one officer and 275 enlisted men, including 176 in the National Guard.

Article 96, (disrespect or insulting language toward a commissioned officer) five officers, 562 Regular Army enlisted men and 368 National Guard enlisted men.

Article 96, (disrespect or threats or insulting language or insubordinate conduct toward or assaults upon a noncommissioned officer) 2,800 Regular Army enlisted men and 1,415 National Guard enlisted men.

Article 96, (disrespect or insulting language or insubordinate conduct or threats toward or assaults upon a sentinel) 210 Regular Army and 210 National Guard enlisted men.

Article 96, (profane or provoking or threatening or indecent language or creating a disturbance in quarters) eleven officers, 158 Regular Army and 21 National Guard enlisted men.

(1 War Department, Annual Reports, 1917. 225-227 (1918)).

The reports for Fiscal Years 1918 and 1919 were differently arranged in that their authors did not classify the offenses by the article violated, but merely by description I will so classify them, but the reader should bear in mind that a portion of the offenses could have been charged under the general article. Also, there were separate tables for offences committed by officers and those committed by enlisted men.

Fiscal Year 1918

Offenses committed by officers

(Article 96) Disrespect toward a sentinel	5
(Article 63) Disrespect to a superior officer	13
(Article 90) Using provoking words or speeches	6

Offenses committed by enlisted men

(Article 59) Advising desertion	15
(Article 66) Causing or exciting a mutiny	1
(Article 65) Disrespect toward noncommissioned officer	317
(Article 96) Disrespect toward a sentinel	20
(Article 63) Disrespect toward a superior officer	319
(Article 62) Contemptuous words toward the President and others	36
(Article 70) Using provoking words or speeches	37

(1 War Department Annual Reports, 1918 251 and 258-60 (1919)).

Fiscal Year 1919

Offenses committed by officers

(Article 66) Attempting to create a mutiny	2
(Article 96) Disrespectful or threatening language toward noncommissioned officer	1
(Article 96) Disrespect toward sentinel	4
(Article 96) Speaking words inducing others to misbehave	6
(Article 63) Disrespect toward superior officer	37
(Article 90) Using provoking words or gestures	20

Offenses committed by enlisted men

(Article 59) Advising, persuading or assisting desertion	17
(Article 66) Causing or exciting a mutiny	12
(Article 65) Disrespect to a noncommissioned officer	295
(Article 96) Disrespect toward a sentinel	30
(Article 96) Speaking words, etc., inducing others to misbehave	12

(Article 63) Disrespect to a superior officer 526
(Article 62) Contemptuous words toward the President and others 36
(Article 90) Using provoking words and gestures 44

(1 War Department Annual Reports, 1919 694-95 and 704-05 (1920).)

17 Laurence Stallings, The Doughboys, The Story of the A.E.F., 1917-1918 34 (1963).

18 Id. at 35.

19 Fiscal Year 1917 (general courts-martial only)

Offenses committed by officers
none clearly indicated

Offenses committed by enlisted men

Disrespectful language or deportment, one Navy enlisted man
Using abusive, obscene, or threatening language toward another person in the service, seven Navy and four Marine enlisted men.

(Navy Department, Annual Reports of the Navy Department, 1917 146-147 (1918).)

Fiscal Year 1918 (general courts-martial only)

Offenses committed by officers

Disrespectful language and deportment, two naval officers.
Using obscene and threatening language to another person in the Navy, one naval officer.

Offenses committed by enlisted men

Disrespectful language and deportment, 13 Navy and one Marine enlisted men.
Abusive, obscene or threatening language toward another person in the service, 42 Navy and 10 Marine enlisted men.

(Navy Department, Annual Reports of the Navy Department, 1918 420-22 (1918).)

Fiscal Year 1919 (general courts-martial only)

Offenses committed by officers

Using abusive language toward another person in the service, three naval officers.
Using abusive language toward superior officer, one naval officer.
Disrespectful language and deportment toward superior officer, two naval officers.
Profane and obscene language, one naval officer.

Offenses committed by enlisted men

Disrespectful in language and deportment, 16 Navy and four Marine enlisted men.
Using abusive, obscene or threatening language toward another person in the service, 45 Navy and five Marine enlisted men.

(Navy Department, Annual Reports of the Navy Department, 1919 342-45 (1920).)

20 2 Military Laws of the United States, supra note 2 at 1506.

21 Id. at 1491.

22 See supra. Chapter II, note 51.

23 The War Department Annual Reports, supra. note 16.

24 The Annual Reports of the Secretary of the Navy, supra. note 19.

25 This may have been more the case in the A.E.F. than the Army as a whole.

26 2 Military Laws of the United States, 1921, supra. note 2, at 1446.

27 War Department Annual Reports, 1918, supra. note 16, at 182

28 Id.

29 Id.

30 Vicar-General George J. Waring, United States Catholic Chaplains in the World War xiv, xv (1924)

31 Id.

32 Id. at xv.

33 War Department Annual Reports, 1918, supra. note 16, at 182.

34 Id.

35 War Department Annual Reports, 1919, supra. note 16, at 508.

36 Id. at 638-39.

37 Id. at 639.

38 1 Navy Department, The History of the Chaplain Corps, United States Navy, 172 (1950).

39 Id.

40 Id. at 173.

41 2 Military Laws of the United States, 1921, supra. note 2, at 1446.

42 Id. at 1481-82.

43 Id. at 1482.

44 Id.

45 Id. at 1483.

46 Id. at 1491.

47 Id. at 1495.

48 Id. at 1496.

49 Id. at 1483.

50 Department of the Army, Military Laws of the United States, 1949 249-98 (1950).

51 1 Navy Department, Laws Relating to the Navy Annotated 2156-77 (1949).

52 For a recent and well-detailed account of this phase of Mitchell's career, see Burke Davis, The Billy Mitchell Affair (1967).

53 Burke Davis, The Billy Mitchell Affair 201-06 (1967).

54 Id.

55 Emile Gauvreau and Lester Cohen, Billy Mitchell 108 (1942).

56 The Billy Mitchell Affair, supra, note 52, at 210-11, 214 and 226.

57 Id. at 214-18.

58 Id. at 218.

59 Id. at 222.

60 Id.

61 Id.

62 Id.

63 Id. at 223.

64 Id. at 243.

65 Id. at 243-44.

66 Id. at 245.

67 Id. at 257.

68 Id. at 326. This was later reduced.

69 Douglas MacArthur, Reminiscences 85-86 (1964).

70 Id. at 86.

71 Frazier Hunt, The Untold Story of Douglas MacArthur 152 (1954).

72 Id. at 153.

73 1 Navy Department, Compilation of Court-Martial Orders for the Years 1916-1937 756-57 (1940).

74 Id. at 694-96.

75 War Department, Digest of Opinions of the Judge Advocate General of the Army, 1912-1940, 283 (1942).

76 Id. at 287.

77 Id.

78 Id.

79 War Department, Supplement 1 to the Digest of Opinions of the Judge Advocate General of the Army, 1912-1940 13 (1942).

80 2 Compilation of Court-Martial Orders for the Years 1916-1937, supra, note 73, at 1579.

81 Id. at 1572.

82 1 Laws Relating to the Navy, Annotated, supra, note 51, at 2165.

83 Fiscal Year 1926, War Department

General court-martial convictions

Article 59, three.
Article 63, 25.
Article 65, 39.
Article 96, (disrespect for sentinel) five.
Article 96, (contempt of certain officials) one.

(War Department, Annual Report of the Secretary of War, 1926 187-88 (1926).

Fiscal Year 1926, Navy Department

General court-martial convictions

Article 8, Section 6, one naval officer, seven Navy and four Marine enlisted men.

Summary and Deck courts-martial

Article 8, Section 1, 64 Navy and eight Marine enlisted men.
Article 8, Section 6, 311 Navy and 62 Marine enlisted men.
Article 22, (abusive language) 18 Navy and nine Marine enlisted men.
Article 22, (threatening language) 53 Navy and 11 Marine enlisted men.

(Navy Department, Annual Reports of the Navy Department, 1926 105-06 and 112 (1927).)

Fiscal Year 1932, War Department

General court-martial convictions

Article 59, three.
Article 63, 33.
Article 65, 21.
Article 96, (disrespect toward sentinel) two.

(War Department, Annual Reports of the Secretary of War, 1932 244-45 (1932)).

Fiscal Year 1932, Navy Department

General court-martial convictions

Article 8, Section 3, one Marine enlisted man.
Article 8, Section 5, one naval officer, two Navy and four Marine enlisted men. Two naval enlisted men were convicted of contempt toward their superior officer, the Article not being specified.

Summary and Deck courts-martial

Article 8, Section 1, 52 Navy and 14 Marine enlisted men.
Article 8, Section 6, 174 Navy and 38 Marine enlisted men.
Article 22, (abusive language) nine Navy and one Marine enlisted man.
Article 22, (threatening language) 29 Navy and seven Marine enlisted men.

(Navy Department, Annual Reports of the Navy Department, 1932 140-41 and 143 (1933).)

84 2 Military Laws of the United States 1921, supra, note 2, at 1506, 1459 and 1483.

85 Military Laws of the United States 1949, supra, note 50, at 298, 292 and 283.

86 1 Navy Department, Laws Relating to the Navy Annotated 215? and 2183-84 (1950).

87 Wright v. White, 110 F.2d 948 (Oreg. 1941).

88 See supra, footnote 83.

89 2 Military Laws of the United States, 1921, supra, note 2, at 1446.

90 Military Laws of the United States, Annotated, 1949, supra, note 50, at 249-51.

91 1 Laws Relating to the Navy, Annotated, supra, note 51, at 2156-57.

92 1 Department of the Air Force, Air Force Chaplains 65 (1961).

93 Id. at 50.

94 Id.

95 Id.

96 1 The History of the Chaplain Corps, United States Navy, supra, note 38, at 205.

97 Navy Department, Annual Report of the Navy Department, 1926 140 (1927).

98 Navy Department, Annual Report of the Navy Department, 1932 169 (1933).

99 For further discussion see 1 Air Force Chaplains, supra, note 92, at 58-61 and 1 The History of the Chaplain Corps, United States Navy, supra, note 38, at 217-20.

100 1 Air Force Chaplains, supra note 92, at 59

101 Id.

102 Elliot v. White 43 F.2d 997 (1928).

103 Military Law of the United States, 1949, supra. note 50, at 982-90.

104 Ladislas Farago, Patton, Ordeal and Triumph 416-23 (1963).

105 Id. at 812-17

106 4 War Department, Bulletin of the Judge Advocate General of the Army 55-6 (1945).

107 2 Id. at 16 (1943).

108 3 Id. at 150 (1944).

109 2 Id. at 5 (1943).

110 4 Id. at 55-6 (1945).

111 Sanford v. Callan, 148 F.2d 376 (5th Cir. 1945), cert. dismissed, 326 U.S. 679 (1945).

112 1 Laws Relating to the Navy, Annotated, supra. note 51, at 2168.

113 Id.

114 Id.

115 Hartzel v. United States, 322 U.S. 680 (1944).

116 1 Laws Relating to the Navy, Annotated, supra. note 51, at 2168.

117 1 Bulletin of the Judge Advocate General of the Army, supra. note 106, at 369 (1942).

118 2 Id. at 339-40 (1943).

119 1 Laws Relating to the Navy, Annotated, supra. note 51, at 2168.

120 2 Bulletin of the Judge Advocate General of the Army, supra. note 106, at 339-40 (1943).

121 3 Id. at 513 (1944).

122 Bill Mauldin, Up Front 26 (1945).

123 Id. at 26-7.

124 Id. at 28-9.

125 Fettes, Ordeal and Triumph, supra, note 104, at 751-52.

126 Id. at 751.

127 Id. at 732.

128 Up Front, supra, note 122, at 99.

129 Id. at 32.

130 Id. at 28.

131 Id. at 32.

132 Military Laws of the United States, 1949, supra, note 50, at 283, 292, and 296.

133 1 Navy Department, Laws Relating to the Navy, Annotated, 1945, 441-2, 448 and 465 (1945).

134 3 Bulletin of the Judge Advocate General of the Army, supra, note 106, at 382 (1944).

135 Id. at 186-87.

136 4 The Papers of Dwight David Eisenhower, The War Years 2266-87 (Alfred D. Chandler, Jr. ed. 1970)

137 1 Laws Relating to the Navy, Annotated, supra, note 51, at 2156.

138 cCord v. Pope, 124 F.2d 68 (5th Cir. 1941)

139 War Department, The Chaplain Serves, Chaplain Activities 1943 7 (1944).

140 2 The History of the Chaplain Corps, United States Navy, supra, note 36, at 49.

141 Id. at 49-54.

142 Id. at 54.

143 Id. at 275-83.

144 1 Air Force Chaplains, supra, note 92, at 136-39.

145 2 The History of the Chaplain Corps, United States Navy, supra, note 36, at 215.

146 Id.

147 1 Air Force Chaplains, supra, note 92, at 139.

148 2 The History of the Chaplains Corps, United States Navy, supra, note 36, at 214

149 Id.

150 On Front, supra, note 139, at 103.

151 2 Air Forces Chaplains, supra, note 92, at 131.

NOTES

Chapter IV

1 Act of May 5, 1950, ch. 169, 64 Stat. 134.

2 Id. at 135.

3 Id.

4 Id. at 136.

5 Id. at 139.

6 Id. at 142.

7 Id. at 142-43.

8 Uniform Code of Military Justice, 10 U.S.C. Sec. 888 (1956).

9 Richard H. Rovere and Arthur Schlesinger, Jr., The Macarthur Controversy and American Foreign Policy, 154 (1965).

10 Id. at 156-57.

11 Id. at 157.

12 Id. at 167-68.

13 Id. at 168-170.

14 Id. at 171-72.

15 2 Harry S. Truman, Memoirs 444 (1956).

16 Id. at 447.

17 Id. at 448.

18 Current Biography, 1953 526 (Marjorie Dent Candee ed. 1954).

19 Id.

20 Hearings on S. R. 191 Before the Committee on Armed Services, United States Senate, 87th Cong., 1st Sess. 12 (1961).

21 Id.

22 Id. at 13.

23 Id. at 14.

24 United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

25 Id. at 105.

26 Id.

27 Id. at 105-06.

28 Id. at 106.

29 Id. at 106-07.

30 Id. at 119.

31 United States v. McQuaid, 5 C.M.R. 525 (A.C.M. 4,889, 1952) pet. denied, 5 C.M.R. 130 (1952).

32 Id. at 528-29. See Appendix B for the statement in full.

33 These Boards of Review were provided by the Uniform Code to give automatic review to all courts-martial of a serious nature. See Article 66 of the Uniform Code of Military Justice.

34 McQuaid, supra. note 31, at 529.

35 Id. at 530.

36 Id.

37 Id.

38 United States v. Batchelor, 19 C.M.R. 452 (C.M. 377,832, 1955).

39 Id. at 81-82. See Appendix C for the complete text of the letter.

40 Id. at 483.

41 Id.

42 United States v. Batchelor, 7 U.S.C.M.A. 354, 22 C.M.R. 144 (1956).

43 United States v. Gustafson, 5 C.M.R. 360 (C.G.C.M.S. 13,513, 1952).

44 Id. at 361.

45 United States v. Cramer, 8 U.S.C.M.A. 221, 24 C.M.R. 31 (1957).

46 Id. at 33.

47 Id.

48 United States v. Ferenczi, 10 U.S.C.M.A. 3, 27 C.M.R. 77 (1958).

49 Id. at 80.

50 United States v. Sanders, 3 C.M.R.(Air Force) 351 (A.C.M. 2,631, 1950).

51 Id. at 352.

52 Id.

53 United States v. Spigner, 16 C.M.R. 604 (A.C.M. S-9,083, 1954).

54 Id. at 605.

55 Id.

56 Id. at 607.

57 United States v. Parkhurst, 2 C.M.R. (Air Force) 787 (A.C.M. 2,153, 1950).

58 United States v. Noriega, 7 U.S.C.M.A. 196, 21 C.M.R. 322 (1956).

59 Id. at 325.

60 Id.

61 Id. at 326.

62 United States v. Montgomery, 11 C.M.R. 308 (C.M. 369,653, 1953).

63 Id. at 313.

64 United States v. Richardson, ___ U.S.C.M.A. ___, 6 C.M.R. 88 (1952).

65 Id. at 90.

66 Id.

67 United States v. Burgess, 16 C.M.R. 374 (N.C.M. 317, 1954).

68 Id. at 375.

69 Id., citing William Winthrop, Military Law and Precedents 567 (2nd.1920).

70 United States v. Johnson, 2 C.M.R. (Air Force) 233 (A.C.M. S-165, 1949).

71 Id. at 234.

72 Id.

73 The relationship between the spoken words themselves and the surrounding circumstances is also discussed in United States v. Watters, 2 C.M.R. (Air Force) 497 (A.C.M. S-289, 1949).

74 United States v. Roby, 2 C.M.R. 704 (A.C.M. S-1,761, 1951).

75 Id. at 707. The obscene words were deleted in the reported case.

76 Id. at 708.

77 United States v. Whitaker, 5 C.M.R. 539 (A.C.M. S-2,302) 1952.

78 Id. at 556.

79 Id.

80 United States v. St. Croix, 18 C.M.R. 465 (C.G.C.M.S. 20,146, 1955).

81 Id. at 466.

82 Id.

83 United States v. Shirley, 3 C.M.R. 839 (A.C.M. S-2,695, 1952).

84 United States v. Higgins, 10 C.M.R. 453 (C.M. 363,133, 1953).

85 Shirley, supra. note 83, at 842. But, see Whitaker, supra. note 77 for an apparent difference of opinion.

86 Id.

87 United States v. Carter, 3 C.M.R. (Air Force) 801 (A.C.M. S-827, 1950).

88 Id. at 802.

89 Id. at 806.

90 United States v. Bowden, 24 C.M.R. 540 (A.C.M. S-14,278, 1957).

91 Id. at 544.

92 United States v. Lacy, 10 U.S.C.M.A. 164, 27 C.M.R. 238 (1959).

93 Bowden, supra. note 90, at 545.

94 United States v. Hughens, 14 C.M.R. 509 (N.C.M. 290, 1954).

95 Id. at 511.

96 Id.

97 United States v. Turner, 10 C.M.R. 394 (C.M. 362,294, 1953) pet. denied 11 C.M.R. 248 (1951).

98 Id. at 397-98.

99 United States v. Jackson, 8 C.M.R. 215 (C.M. 356,538, 1953).

100 Department of the Army, Military Laws of the United States, Annotated, 1949, 298 (1950).

101 Act of May 5, 1950, Ch. 169, 64 Stat. 136.

102 Id. at 142.

103 United States v. Watson, 4 U.S.C.M.A. 557, 16 C.M.R. 131 (1954).

104 S.Rep. No. 486, 81st Cong., 1st Sess. 35 (1949).

105 See supra. Chapter III, note 158.

106 United States v. Morgan, 17 C.M.R. 584 (A.C.M. 9,036, 1954).

107 Id. at 586.

108 West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

109 Id. at 642. Quoted by the Board of Review, Morgan, supra. note 106, at 587.

110 Id. Quoted by the Board of Review, Morgan, supra. note 106, at 587.

111 Id. Quoted by the Board of Review, Morgan, supra. note 106, at 587.

112 McCord v. Page, 124 F2d 68 (5th Cir., 1941). supra. Chapter III, note 138.

113 Id. at 69. Quoted by the Board of Review, Morgan, supra. note 106, at 588.

114 To the same effect, see United States v. Cupp, 24 C.M.R. 565 (A.C.M. 13,462, 1957).

115 Ex Parte Campo 71 F.Supp. 543 (S.D.N.Y. 1950).

116 Roy J. Honeywell, Chaplains of the United States Army 307-310 (1958).

117 Id. at 330.

118 2 Department of the Air Force, Air Force Chaplains 67 (1961).

119 Chaplains of the United States Army, supra. note 116, at 312.

120 2 Air Force Chaplains, supra. note 118, at 66-67.

121 Id.

122 Id. at 66.

123 Id. at 67.

124 4 Navy Department, History of the Chaplain Corps, United States Navy, 2 (1953).

125 5 Id. III (1957).

126 2 Air Force Chaplains, supra. note 118, at 69.

127 5 History of the Chaplain Corps, United States Navy, supra. note 124, at 130-131 (1959).

128 2 Air Force Chaplains, supra. note 118, at 69.

129 Id.

130 6 The History of the Chaplain Corps, United States Navy, supra. note 124, at 89 (1960).

131 Id. at 193.

132 2 Air Force Chaplains, supra. note 118, at 79.

133 Id. at 67.

134 Id.

NOTES

Chapter V

1 United States v. Levy, 39 C.M.R. 672 (C.M. 416,462, 1968).

2 Id. at 674-75.

3 Id. at 675.

4 Id. at 675.

5 Id. at 678.

6 Levy v. Dillon, 415 F.2d 1263 (10th Cir., 1969).

7 Newsweek, Apr. 12, 1971, at 18.

8 19 U.S.C.M.A. __, 42 C.M.R. __ (1970).

9 19 U.S.C.M.A. __, 42 C.M.R. __ (1970).

10 70-9 JALS 1 and 5 (D.A. Pam. 27-70-9).

11 Id. at 2.

12 Id.

13 Id.

14 17 U.S.C.M.A. 165, 37 C.M.R. 425 (1967).

15 Id. at 431.

16 Id. at 439.

17 United States v. Gray, No. 22,546 (U.S C.M.A., Aug. 26, 1970).

18 Id. at 13.

19 Id.

20 The complete text appears in Appendix B.

21 United States v. Gray, supra. note 17, at 5.

22 Id. at 6-7.

23 Id.

24 40 C.M.R. 720 (C.M. 418,868, 1969).

25 Id. 722. The complete text of the statement appears in Appendix E.

26 137 U.S. 147 (1890).

27 Id. at 153.

28 Anduk and Stelts, supra. note 24, at 723.

29 Id. at 724.

30 Id. at 726 and 727.

31 Locks v. Laird, 300 F. Supp 915 (N.D. Cal., 1969) at 916.

32 Id.

33 Id. at 918.

34 283 U.S. 359 (1931).

35 Locks, supra. note 31, at 918-19.

36 Id., citing Barbara W. Tuchman, The Guns of August 37-38 (1962).

37 United States v. Locks, 40 C.M.R. 1022 (A.C.M. 20, 410, 1969).

38 Id. at 327.

39 39 C.M.R. 969 (A.C.M. 20, 248, 1968).

40 Air Force Manual 35-100, Par 1-10 C (May 11, 1967).

41 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1955) at 105-09.

42 Toomey, supra. note 39, at 973.

43 Id. at 973-74.

44 Schacht v. United States, 398 U.S. 58 (1970).

45 18 U.S.C. Section 702.

46 Schacht, supra. note 44, at 63-64.

47 The clarity of the reasoning behind this difference between limitations validly placed on the military and civilian communities is, unlike other cases, not so obvious. The constitutionality of the limitation on members of the military is bottomed, in part, on

the importance of the reputation of the military service and the unique relationship of respect for the uniform and the military reputation, especially in the civilian community. Granted, that if the person wearing the uniform while engaged in activity critical of the Armed Forces and Government to whom it belongs is actually a member of the Military, the Armed Forces may be placed in a worse light than if he is a civilian. Nevertheless, given the importance, the mystique, of the uniform, it is difficult to find justification for the ruled enunciated by the Supreme Court in Schacht v. United States. The uniform, in a sense, symbolizes the Government; therefore, the Government should be able to establish the conditions under which it will be worn, both by the military and civilians. Federal District Judge Zirpoli was right when he stated that he could not say that "the First Amendment deprives the military of authority to determine the circumstances in which symbolic power (of the uniform) is either generated or dissipated." Locks, supra. note 31, at 919.

48 United States v. Goins, 15 U.S.C.M.A. 175, 35 C.M.R. 147 (1964).

49 No. 23, 837 (U.S.C.M.A., April 9, 1971).

50 Id. at 3.

51 For such a discussion, see Cortright v. Resor, 325 F. Supp 797 (S.D.N.Y., 1971) at 813-18.

52 307 F.Supp. 849 (D.S.C., 1969), aff'd mem., 429 F.2d 427, appeal pending.

53 Id. at 851.

54 Id. at 854.

55 Id. at 855.

56 431 F.2d 691 (4th Cir, 1970), appeal pending.

57 Supra, note 52. Here, however, the guidelines were found in an Army Regulation, A.R. 210-10, Paragraph 5-5.

58 Supra. note 51.

59 United States v. Wolfson, 36 C.M.R. 723 (C.M. 413,411, 1966).

60 Id. at 728.

61 Supra. notes 9 and 10.

62 Id. at 953.

63 Dash, supra. note 52.

64 Id. at 856.

65 "Religion, Conscience and Military Discipline," 52 Mil. L. Rev. 77-101 (1971). This is an excellent article that explores the problem in great depth in a most scholarly manner.

66 Id. at 86.

67 Id. at 88.

68 Id. at 89.

69 Anderson v. Laird, 316 F.Supp 1080 (D.D.C., 1970).

70 Foreman, supra. note 65, at 90.

71 Id.

72 United States v. Wheeler, 12 U.S.C.M.A. 387, 30 C.M.R. 387 (1961).

73 Foreman, supra. note 65, at 91.

74 Id.

75 36 C.M.R. 741 (N.C.M. 65-1,179, 1965).

76 Id. at 747.

77 Id. at 749-50.

78 36 C.M.R. 829 (C.G.C.M.S. 21,886, 1966).

79 Id. at 831.

80 Supra. note 65.

81 Id. at 95.

82 Id.

83 Bridges v. Davis, 311 F.Supp 935 (D.Hawaii, 1969).

84 Id.

NOTES

Chapter VI

1 United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954) at 109.

2 3 C.F. Adams, The Works of John Adams 66 (1851).

3 Id. at 83.

4 1 Benson J. Lossing, The Life and Times of Philip Schuyler 427 (1872-73).

5 For an excellent and scholarly analysis of Article 88 and its historical development, see Kester, "Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice," 81 Harv. L. Rev. 1697 (1968).

6 United States v. Ferenczi, 10 U.S.C.M.A. 3, 27 C.M.R. 77 (1958), at 80.

7 United States v. McQuaid, 5 C.M.R. 525 (A.C.M. 4,887, 1952), at 530.

8 Samuel Huntington, The Soldier and the State 226-69 (1957).

9 39 C.M.R. 969 (A.C.M. 20,248, 1968).

10 Id. at 973-74.

11 1 William Winthrop, Military Law 854 and 856 (1886).

12 Cortright v. Resor, 325 F.Supp 797 (E.D.N.Y., 1971) at 805.

13 United States v. Voorhees, supra. note 1, at 107.

14 Boyce, "Freedom of Speech and the Military" Part I, 1968 Utah Law Review 240 at 266.

15 Id.

16 "Soldiers Who Insult the President," supra. note 5, at 1766.

17 United States v. Amick and Stolte, 40 C.M.R. 720 (C.M. 418,868, 1969) at 723.

18 Dash v. Commanding General, Fort Jackson, South Carolina, 307 F.Supp 849 (D.S.C., 1969) at 856 aff'd mem., 429 F2d 427. appeal pending.

[9] Cartright v. Reese, supra, note 12, at 805-06.

SUMMARY OF APPENDICES

Appendix A. This is the correspondence of Lieutenant Edward P. Turner dealing with his complaints against Lieutenant Colonel William R. Shafter.

Appendix B. This is the document that Private First Class Allen E. McQuaid posted at Elmendorf Air Force Base, Alaska, in 1954.

Appendix C. This consists of excerpts of a letter sent by Corporal Claude R. Batchelor to his hometown newspaper, while he was a prisoner of war in Korea.

Appendix D. This is the letter placed in the log book by Private Gray in Hawaii.

Appendix E. This is the leaflet written and distributed by Privates Anick and Stolte at Fort Ord, California.

APPENDIX A

Fort Clark, Tex., November 11, 1877.

To the President of the United States Senate.

Sir: In order, at your earliest opportunity, that you may bring the enclosed letter up, I have to state that it is publicly known to most every officer of this command that in our last raid into Mexico, with some four hundred men, Colonel Shafter of the Twenty-fourth United States Colored Infantry, who was commanding and ordered the raid to be made, went into that state without authority, and deceived his department commander, General Ord, in stating afterwards, in his official report to that officer, that he was on a trail. There was no trail, and this raid into that foreign state was premeditated by said Colonel Shafter. As my name may not be known to you, I shall state that I am the son of Admiral Thomas Turner, United States Navy, of Philadelphia, and being one of the cavalry officers at this post, I am ready to assert before the general public that if affairs of this kind are permitted after being well-known, that I have done conscientiously my duty in exposing such deceits.

I am well prepared to prove that affairs of this kind have been done before; and this last flagrant act of Colonel Shafter I am now prepared to prove, to the knowledge of indisputable witnesses. This last act has just occurred, and the witnesses are all here.

Very respectfully, your obedient servant,

EDWARD P. TURNER

Lieutenant Tenth United States Cavalry.

The enclosure referred to read as follows:

Fort Clark, Tex., November 5, 1877.

To the Editor:

As this distant region is so far removed from civilization, and so many false reports are imposed upon the public, it seems at this juncture my duty to expose an "official falsehood" which has recently appeared in the newspapers.

Col. William H. Shafter, the lieutenant-colonel of the Twenty-fourth Colored Infantry, permits and forwards a report of Lieutenant Bullis, stating that he, Lieutenant Bullis, was on an Indian trail when he crossed the Rio Grande, during our last raid into Mexico. Lieutenant Seyburn, who was with Lieutenant

Ballis, informs us that there was no trail; therefore, Colonel Shafter has been guilty of the most gross misrepresentation of facts, and the public had better be on their guard when reading the reports of this officer.

EDWARD P. TURNER
Lieutenant Tenth United States Cavalry.

Later in the month the following letter was sent to a member of Congress.

Fort Clark, Tex., November 23, 1877.

To the Hon. N. P. Banks.

'Sir: I have the honor to enclose you copy of an official letter which has passed through the regular channels and returned to me without action being taken. This is my reason for transmitting the same to you, in order that some steps may be taken to investigate the general condition of affairs under Colonel Shafter. I have already reported to the department commander, in a previous letter, the fact that Colonel Shafter's account of his last raid into Mexico was untrue, regarding entering Mexico on an Indian trail, as there was no trail. Notwithstanding that this falsehood was reported by me direct to the department commander, no action has been taken, nor has Colonel Shafter himself adopted any measures to place his conduct in a proper light before the public. The accompanying letter renders it superfluous for me to describe Colonel Shafter's reputation.

You will be able to judge of his character, and of his fitness to be entrusted with such a large and important command, when you are informed that Colonel Shafter has permitted such letters to be placed on record without having the matter investigated. This large cavalry command is under the direct orders of Colonel Shafter, and was ordered down here to perform certain duties along the Rio Grande, especially to prevent raiders from crossing the river. If a proper inquiry is made as to the manner in which the above duties have been performed, it will be ascertained that Colonel Shafter has accomplished nothing.

The following I wish especially to bring under your notice:

During the month of May, 1876, while in the field Colonel Shafter illegally appointed one of his relatives a sutler for the command. He not only gave this relative permission to trade, but furnished him Government transportation for his goods. The full particulars regarding this can be proven here and now by indisputable witnesses at this post.

Very respectfully, your obedient servant,

EDWARD P. TURNER
Lieutenant Tenth Cavalry.

The enclosure was as follows:

Tenth Cavalry, Camp on Pinto Creek, Tex.
November 11, 1877.

To the Assistant Adjutant-General
Headquarters Department of Texas:
Through headquarters Tenth Cavalry, camp on Pinto Creek, Tex., and through district headquarters, Fort Clark, Tex., to the assistant adjutant-general, headquarters Department of Texas.

Sir: As Colonel Shafter, in his endorsement on my communication directed to the assistant adjutant-general, headquarters Department of Texas, dated October 31, 1877, denies the truth of what I have stated in said letter, why does he not prefer charges against me for transmitting such a scandalous communication? How can any Army officer allow such grave accusations to be brought against his without trying to prove their falsity and punishing his accuser? On the contrary, Colonel Shafter dare not even investigate this, and, in denying its truth, he is but adding another falsehood to shield his career of infamy from investigation, Colonel Shafter remarks, in the said endorsement, that he believes Captain Lebo innocent. Why this partiality? Why attempt to conceal such low behavior, when abundance of proof is right at hand, both from commissioned officers and enlisted men? In this very said endorsement Colonel Shafter proves his animosity and prejudice against me by referring to Colonel Dodge and General McLaughlin. As regards Colonel Dodge, that affair has been settled by a court-martial some five years ago; and Colonel Shafter, in alluding to that circumstance, again shows his prejudice against me. Still another instance of this fellow's prejudice is demonstrated in his remarks about my action with General McLaughlin, as that officer has told me, in the presence of his colonel and several other officers, that he was perfectly satisfied with the explanation in the matter, shaking hands most cordially, etc.

In order that Colonel Shafter may have every opportunity of clearing himself, I will give the department commander another item, which has been the current topic of conversation amongst officers of the Army, to this effect:

Colonel Shafter, when at Duncan, drove out in a buggy with Captain Cunningham's colored wench, and, when in the chaparral, attempted licentious libertine with said wench. This wench told Colonel Shafter that she was no dog, but for him to visit her house that evening. Colonel Shafter went to her house, undressed, got into bed with said wench; still she declined to grant his desires, having witnesses to prove this for

the protection of Captain Cunningham, who was supporting said wench. How can any Army officer hold up his head when such charges are laid at his door?

That the department commander may know that I wish nothing but the truth to be recorded, I am ready to prefer charges and sustain every fact in my letter.

The serious criminal affair of opening private letters, of which Colonel Shafter has been guilty, I shall lay before the civil authorities. I send one copy of this direct to the assistant adjutant-general and to these officers as stated in my previous letter.

Very respectfully, your obedient servant,

EDWARD P. TURNER

Lieutenant Tenth United States Cavalry.

A true copy:

J. H. T. KING,
Captain and Assistant Surgeon, United States Army.

(1st endorsement).

BATTALION TENTH CAVALRY.
Camp on Pinto, Tex., November 10, 1877.

Respectfully forwarded to the assistant adjutant-general, district of the Nueces, but only for the reason that the writer states that he will send a copy direct to the assistant adjutant-general, (meaning of this department, I presume). Otherwise, I should decline being the medium of transmitting a communication of this character.

S. F. NORVELL,
Captain Tenth Cavalry, Commanding.

(2nd endorsement).

Headquarters Fort Clark, Tex.,
November 12, 1877.

Respectfully forwarded to the assistant adjutant-general, Department of Texas.

W. R. SHAFTER,
Lieutenant-Colonel Twenty-fourth Infantry, Commanding.

(3rd endorsement).

Headquarters Department of Texas,
San Antonio, Tex., November 14, 1877.

Respectfully returned to the commanding officer, Fort Clark, Tex., who will notify Lieutenant Turner that all such papers will be returned to the district commander, as highly insubordinate and unofficer-like, and that if Lieutenant Turner has charges to prefer against his commander he should send them through the proper channel and in proper shape.

By command of Brig. Gen. E. O. C. Ord:

J. H. TAYLOR,
Assistant Adjutant-General.

(4th endorsement).

Headquarters District of the Nueces
Fort Clark, Tex., November 17, 1877.

Respectfully transmitted to Second Lieutenant Turner, Tenth Cavalry, through commanding officer camp Tenth Cavalry.

By order of Lieutenant-Colonel Shafter:

HERMUS DOUT,
Assistant Adjutant-General.

(5th endorsement).

Headquarters Battalion Tenth Cavalry,
Camp on Pinto, Tex., November 17, 1877.

Respectfully transmitted to Second Lieut. E. F. Turner, Tenth Cavalry.
By order of Captain Norvell:

C. R. WARD,
First Lieutenant Tenth Cavalry, Adjutant.

Fort Clark, Tex., January 19, 1878.

Sir: I have the honor most respectfully to invite your serious attention to the subjoined harrowing details: On the 15th instant, one of the guides came in with the dead body of a Mescalero Indian (Jesus Martinez) tied across the back of a horse, the Indian's head and body horribly bruised and mangled. The guide, a Mexican, stated that Colonel Shafter had promised him a reward of $50 whenever he would bring in a dead Indian, his scalp, or other part of the body.

Accordingly, this guide, accompanied by another guide, when in the streets of Zarragoza, Coahuila, Mexico, at midnight of the 13th instant, deserted four Indians (Mescaleros) drunk in the streets, walking in front of them. The guides, who were mounted, thought it a favorable opportunity to gain Colonel Shafter's promised reward.

The guides, therefore, threw their lassoes round the bodies of two of these Indians, and galloped off. One of the Indians cut the rope with a knife, and escaped. The other Indian was dragged by the guide (Julian) out of the town for some distance. The two guides then tied the Indian, still alive, across the back of one of their horses, and hastened to the Rio Grande, crossing back into Texas. The Indian died from this cruel treatment, while tied across the horse, his head hanging on one side and his feet on the other. This "enthusiasm" occurred about 9 o'clock a.m., January 14, 1878, and the Indian's body was brought into Fort Clark and conveyed to the adjutant's office, as previously described. The foregoing is a brief recital of this tragic deed. The Indian who made his escape was a chief, and Jesus Martinez was a minor chief. The

guides had no pretext for perpetrating this diabolical murder, except to obtain the $50 promised by Colonel Shafter. Comments from me on such a fiendish outrage (an international outrage) is [sic] unnecessary, although it will compare with other infamous transactions in the execution of which Colonel Shafter is "facile princeps." It is proper to explain that these two guides are carried upon the post rolls as mule-packers, but are employed as guides by Colonel Shafter. What international complications with Mexico may ensue from Colonel Shafter having instigated this unwarrantable deed it is difficult to anticipate, and I, therefore, lose no time in bringing the matter to your knowledge, that proper action may be taken.

I am, sir, very respectfully, your obedient servant,
EDWARD P. TURNER,
Lieutenant Tenth United States Cavalry.

APPENDIX B

FRIENDS AND SYMPATHIZERS.
LET US STOP AND THINK FOR
A MINUTE--ALL OF US

Whose war are we fighting and why are we fighting it? Who are the Joes who get the best breaks in the service? Who are the guys who are "happy" in the service, and who are the guys who "hate" the service? And why is the Soviet Union our acknowledged enemy?

These are just a few questions, picked at random from many such questions that should be important to all of us, and uppermost in all our minds.

First, this war, as usual, is not our war--that is, my war, or your war, or the guy's next door. Again it is a sordid story of Wall Street Imperialism, just as it was last time.

Ask the International Bankers how much they are pocketing as a result of this "mobilization," the "necessity" of which has placed you and I and all of us in--Alaska. Naturally, these International Bankers will not tell you just what is in it for them, but they have been quick to point out just where you come in as guardians and defenders of an economic system that plainly reeks of unfairness and injustice, to use the mildest of terms, but this is not intended to be an essay on Political Economy; rather it is merely an appeal to all of you to use some plain common sense. And once it is clear that the big-time capitalist war-mongers are the only ones benefiting from this latest war (as is the case in all wars we have fought or will fight), then we can answer the remaining questions pretty near correctly in the most generalized of terms.

The Joes who get the best breaks are the ones looked upon by the capitalists and their henchmen as those most suitable to carry on their dirty work.

The guys who are "happy" in the service are those who probably neither know nor care what the hell I am talking about. It is them to whom I appeal most strongly: read a little, think a lot, and pull yourselves out of the mire.

The guys who "hate" the service will form (many of them) the foundations of the next society. The capitalist bosses, however, have them sewed up pretty tightly by bourgeois regulations. I appeal to them simply to follow the dictates of their own consciences.

AND THE SOVIET UNION IS OUR ACKNOWLEDGED ENEMY BECAUSE IT SEEKS TO SET RIGHT ALL THESE ROTTEN WRONGS, BREAK UP THE BIG-TIME CAPITALIST MONOPOLIES AND GIVE YOU AND I SOMETHING TO LIVE FOR OTHER THAN PERFORMING OUR "DUTIES" AS TOOLS OF THESE SAME WARMONGERS, EXISTING AT THEIR WHIM OR COMMAND--IN RETURN FOR WHICH THEY GIVE US JUST ENOUGH, AND REAP FOR THEMSELVES THE GREAT BULK OF THE HARVEST OF WAR!

The Soviet leaders speak as nearly to the truth as it is possible to speak in this life--and the truth hurts. It has provoked the capitalists into a frenzied defense of their tottering system. And the capitalist cares not little for the welfare of those who are merely his tools!----

THINK!!

APPENDIX C

So much of the letter as was reproduced in the Board's opinion is as follows:

> What I want to say is drastically important, not only to we American Prisoner's of War but it could mean the life or death of every man, woman and child in the United States. If you received my previous letters you know the subject was peace . . . . I am perfectly aware that high officials from all over keep trying to give people the impression that we P.O.W.'s are going through a process of 'mental indoctrination', or, in other words, poisoning of the mind with radical literature. That is ridiculous!
>
> You are, no doubt, quite aware of the race of science between various countries over the invention of the dreadful atomic bomb. The same thing is just as likely to occur with bacteriological warfare, as if the atom bomb wasn't bad enough. As you know, germs have no sense of differentiation. They are tiny parasitic monsters which pick on any living thing in their path carrying their dreaded diseases to men, women and babies alike. Surely, the conscience of such men who would use such a thing can be no deeper than that of the germs they employ.
>
> I cannot state that I have witnessed this crime with my own eyes—so giving more proof to you, but I am, nevertheless, convinced of the fact that it is being used. When the charge was first made, quite some time ago, many of us here couldn't believe it. But after seeing much of the evidence we had to admit to ourselves that there were indeed such men in America.
>
> There were four American airmen shot down and captured by the K.P.A. and C.P.V. These men have admitted their personal participation in this bestial crime and have denounced it with all the power their conscience can muster.
>
> . . . . . .
>
> Lt. Quinn and the other 3 airmen have described the way they were ordered to carry out this atrocity.
>
> As I stated, this outrage was hard for us to be-

lieve at first even though we knew that the United States and imperialist Japan were the only two big powers who failed to sign the Geneva Protocol of 1925 banning the weapon and the fact that it was withdrawn from congress in 1947 by President Truman. But various facts have brought out irrefutable proof of it.

One of the most striking was the experiences of a G. I. from another camp. After the American planes had dropped germ bombs near his camp he was assigned to be one of a detail to try to kill the germ laden insects as they were being washed upon the bank from the near-by river. He said that one of the Chinese in charge told him not to touch them as something might happen to him. According to his own statement; 'I laughed at him. I told him there was nothing wrong with them. At the time of what I did, I was only joking. I rubbed some of the ants just a little above my wrist, I also bit the head off one of the ants. . . The ant I bit the head off I spitted it out also.' Later on he said he began to get sick. The next day he saw the Chinese Doctor. But after a short period of time he began to get 'fever, chills, headaches and sharp pains' in his stomach. Shortly after that he was brought to our camp hospital here in Pyantong. He said the doctors gave him continual medical attention giving him medicine and shots. The last I heard from him he was doing very nicely and was truly indebted to the Chinese for saving his life by good medical treatment.

Germ warfare is no longer a question. It is an established horrible reality. The profit seekers in Washington are endangering our lives. The C.P.V. has given us various inoculations against many types of diseases for our safety. Isn't it indeed humiliating that our so-called enemy has to protect us from our own misanthropic authorities! It is high time something was done to put an end to this evil act before we suffer the consequences ourselves. It is the duty of every God loving church, every organization, every single citizen in the United States to Demand Peace Now and Stop this Cruel Inhuman Act Before it is Too Late! I ask you for the sake of mankind--Join with John Quinn and the others now before we regret it!

. . . . . .

P. S. To the Editors:

Dear Sirs: I fully realize this letter is quite long and will therefore take up considerable mostly space. However, if there is any way possible I earnestly wish it to be published. If publication costs too high to pay you--if you will charge it to my account I would be only too glad to repay you upon my release. I am sure that my father--Mr. O. L. Batchelor--address--113 North A Avenue--will stand good for it.

Dear fellow member's of crash crew

As I write this I have but a few hours left on this island. Surely you know why, but where did I go? I'm not to sure right now but I have hopes of Canada, then on to Sweden, Turkey, or India.

It sounds silly to you? Let me ask you this: do you like the Marine Corps? The American policy or foreign affairs.

Have you ever read the constitution of the United States. IT'S A FARCE. Everything that is printed there is contradicted by 'amendments.' Is this fair to the U. S. people? I believe not. Why set back and take these unjust Rules and do nothing about it. If you do nothing will change.

This is what I'm doing, A Struggle for Humanity. But it takes more than myself. We most all fight.

/s/ Mr. GRAY.

APPENDIX E

We Protest

We protest the war in Vietnam. We know that war will never bring about peace. Peace can only be obtained through peaceful means. War cannot be rationalized, justified, or condoned. If you want to fight for peace, stop killing people. The greatest contribution America can make toward world peace is to become a peaceful nation. The communist paranoia that we possess does not justify what we are doing to the country of Vietnam and its people. If a Communist power-play is being enacted, it must be thwarted in some other way. This stupidity of the war must end. Too many of our friends, sent to maintain the Vietnamese, are being killed for nothing, for the foolish game of politics. You as a human being with a free will have the right, if not the obligation, to speak out against these atrocities. You have the free will to refuse to be a part of this stupidity. Our Government is supposed to represent us, not rule us. Do the American people want this war? Do we, who must actively participate, have any desire for this war? Then why do we have it? Why do we allow it to continue day after day.

We are tired of it. We are tired of all the lies about war, the false ideals, the empty reasoning. We see the reality of war; it is a pointless, meaningless, and tragic battle between two differing factions of human beings. Even the most degenerate of animals don't organize and institutionalize their quarrels. Man's emergence from the dark ages is long overdue.

We are uniting and organizing to voice our opposition to this war. If you want to be constructive towards building a better world, then, stop being destructive. If you really want to work for peace and freedom, then join us in our opposition. We are organizing a union in order to express our dissention and grievances. If interested and wish further information, then contact:

PVT KEN STOKES, JR.
US 56 707 892
USAH, FT ORD, CALIF.

PFC DANIEL AMICK
US 56 707 839
52ND ARMY BAND, FT ORD
CALIF.

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Thomas C. Marks, Jr. was born December 14, 1938, at Tampa, Florida. In June, 1956, he was graduated from Henry B. Plant High School. In June, 1960, he received the degree of Bachelor of Science with a major in Political Science from Florida State University. In June, 1963, he received the degree of Bachelor of Laws from Stetson University College of Law and was admitted to the Florida Bar. From 1964 until 1967, he served in the Judge Advocate General's Corps, United States Army. Between tours of duty at the Judge Advocate General's School in Charlottesville, Virginia, he served in the Republic of Vietnam. Following his release from active duty, he practiced law in Tampa, Florida, until 1969, when he enrolled in the Graduate School of the University of Florida.

Thomas C. Marks, Jr. is married to the former Nancy Lynne Carter. He is a member of Pi Sigma Alpha, Phi Alpha Theta, the Southern Political Science Association and the American Bar Association.

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

Ernest R. Bartley, Chairman
Professor of Political Science

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Manning J. Dauer
Department Chairman and
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August, 1971

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